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## The Tennessee Law of Arrest

Rollin M. Perkins

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# THE TENNESSEE LAW OF ARREST

ROLLIN M. PERKINS \*

I. INTRODUCTION .....	510	A. Notice of Arrest .....	588
A. Definitions .....	510	1. In General .....	589
B. The Purpose of Arrest .....	517	2. Form of the Notice .....	591
II. WHAT CONSTITUTES ARREST .....	518	3. Time of Giving Notice .....	592
A. Actual Imprisonment .....	518	4. When Notice Not Re-	
B. Constructive Imprisonment .....	519	quired .....	592
C. Purpose of Imprisonment .....	520	B. Use of Force .....	593
D. Concepts Distinguished from		1. Reasonable Force .....	593
Arrest .....	520	2. Deadly Force .....	595
III. AUTHORITY TO ARREST .....	530	a. To Stop One in Flight .....	596
A. Under a Warrant .....	530	(1) Misdemeanor .....	596
1. The Warrant of Arrest .....	531	(2) Felony .....	598
a. Issuance of the Warrant .....	531	(i) Seriousness of	
b. Requisites of a Valid		Felony .....	599
Warrant .....	535	(ii) Innocence of	
c. "Fair on its Face" .....	538	Arrestee .....	601
d. General Warrants .....	541	(iii) Require-	
e. Life of Warrant .....	544	ment of	
2. Execution of the Warrant .....	544	Neces-	
a. Execution .....	545	sity .....	603
b. By Whom .....	545	b. To Overcome Resist-	
c. Where .....	547	ance .....	605
d. Arrest of Whom .....	550	c. In Self-Defense .....	607
e. Possession of the War-		d. To Prevent Escape .....	608
rant .....	552	3. Handcuffing Arrestee .....	609
f. Exhibition of the War-		4. Breaking Doors and Win-	
rant .....	554	dows .....	610
g. Return of the Warrant .....	556	C. Search and Seizure .....	612
B. Oral Order of a Magistrate .....	556	1. Constitution and Statutes .....	612
C. Assisting an Officer .....	558	2. Basis for Search and Seiz-	
D. Without a Warrant .....	560	ure .....	614
1. Public Offense Committed		3. What Constitutes Search .....	616
in his Presence .....	563	4. Extent of Search .....	617
2. Threatened Breach of the		a. The Person .....	617
Peace .....	568	b. Purse or Luggage .....	618
3. Felony Committed by Ar-		c. Automobiles .....	619
restee .....	570	d. Buildings .....	619
4. Reasonable Suspicion of		5. Time of the Search .....	622
Felony .....	572	6. What May Be Seized .....	623
5. Charge of Felony Pre-		7. Protective Custody .....	624
ferred by Another .....	577	D. Disposition of Prisoner .....	625
6. Official Information .....	578	1. No Commitment Until Ex-	
E. Fugitives from Other States .....	580	amination .....	626
IV. PLACE OF ARREST .....	583	2. Time of Examination .....	627
A. In the Bailiwick .....	583	3. Holding Incommunicado .....	631
B. Outside the Bailiwick .....	584	4. Questions Before Arrest .....	632
C. In a Federal Enclave .....	586	5. Warning .....	633
V. TIME OF ARREST .....	587	6. Bail .....	633
VI. DUTIES AND PRIVILEGES OF AR-		7. Care of Prisoner .....	634
RESTER .....	588	VII. IMMUNITY FROM ARREST .....	635

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The author has written upon the law of arrest on previous occasions. The Foundation Press, Inc., Brooklyn, kindly authorized him to draw upon any part of the material in the chapter on this subject (pt. I, c. 12) in his *Elements of Police Science* (1942). And the *Iowa Law Review* gave similar permission with reference to the article, *The Law of Arrest*, 25 *Iowa L. Rev.* 201 (1940). The author is deeply indebted to both publishers for such permission. He is also indebted to Mr. Hugh E. Wright for assistance in checking the authorities.

A. The Chief Executive .....	635	C. Proceedings under Federal	
B. Diplomatic Immunity .....	637	Law .....	647
C. Congressmen and Legislators	639	D. Exclusion of Evidence ....	648
D. Electors .....	640	E. Other Consequences .....	650
VIII. CONSEQUENCES OF UNLAWFUL		IX. RESISTING ARREST .....	652
ARREST .....	640	A. Resisting Lawful Arrest ...	653
A. Damages in a Civil Action..	642	B. Resisting Unlawful Arrest..	655
B. Criminal Prosecution .....	645		

## I. INTRODUCTION

The many sections in the Tennessee Code<sup>1</sup> dealing with arrest<sup>2</sup> constitute an incomplete codification of the common law of this subject modified by some important changes. This statutory material leaves the common law in full force wherever it is either silent on the particular point or merely restates the pre-existing rule. Those sections which produce results different from those found under the unwritten law leave the latter in the realm of matters having historical interest only,—as far as the law of this state is concerned. The purpose of this undertaking is to depict the present law of Tennessee on arrest. Hence the common law will be emphasized wherever it has not been changed by our statutes but will receive relatively little attention where it has been superseded by legislative enactment. References to statutes of other jurisdictions will be made when useful, without attempting to explain all of the different types of statute to be found in the various states on certain points.<sup>3</sup>

### A. Definitions<sup>4</sup>

An *arrest* is the taking of another into custody for the actual or purported purpose of bringing the other before a court, body or official, or of otherwise securing the administration of the law.<sup>5</sup>

An *arrestee* is one who has been arrested or whose arrest is being sought or attempted.

1. Williams' Annotated Code of Tennessee, 1934, with Cumulative Pocket Supplements. All of the statutory citations in the following footnotes are to this code unless otherwise indicated.

2. There are 46 sections in the chapter on "Arrest" (pt. IV, tit. 4, c. 5) §§ 11517-11546.8, together with numerous others scattered throughout the code, such as §§ 172.4, 696-99, 845.15, 1942, 2771, 3343, 3343.1, 3358, 3564, 5101, 10106, 11018-9, 11044, 11047, 11048, 11057-59, 11103-35, 11417-26, 11430, 11443, 11470, 11608-20, 11683-87, 11711-15, 11862, 11863, 11890-92, 11925-35.

3. For example, the American Law Institute found six types of statute dealing with the authority of an officer to arrest on suspicion of felony. A. L. I. CODE OF CRIMINAL PROCEDURE 236 (Official Draft with Commentaries, 1931).

4. This article is prepared with the hope that it may be useful to peace officers as well as to lawyers and the method of presentation has been governed accordingly. Starting with definitions is for the benefit of the peace officer.

5. This (with the addition of "body or official") is the definition of the American Law Institute except that the Institute adds "of the actor" after the word "custody." RESTATEMENT, TORTS § 112 (1934). An earlier definition in a proposed code had been unduly limited in its scope: "Arrest is the taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense." A. L. I. CODE OF CRIMINAL PROCEDURE § 18 (1931).

An *arrestor* is one who has made, or is attempting or seeking to make, an arrest.

*Assisting escape* is aid rendered to a prisoner in lawful custody to enable him to depart without authority.<sup>6</sup>

*Bailiwick* is the territory or area throughout which a peace officer is authorized to serve in his official capacity.<sup>7</sup>

A *breach of the peace* (in the narrow sense) "is a public offense done by violence or one causing or likely to cause an immediate disturbance of public order."<sup>8</sup>

A *breach of the peace* (in the broad sense) is any public offense.<sup>9</sup>

A *capias* is a writ issued by the clerk of the court, after an indictment has been filed, directing the arrest of the defendant named in the indictment.<sup>10</sup> (It is often called a "bench warrant.")<sup>11</sup>

A *capital offense* is a crime punishable by death.<sup>12</sup>

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6. "If any person, by any means whatever, aid or assist any prisoner lawfully detained in any jail or place of confinement, other than the penitentiary, for any felony, in an attempt to escape, whether such escape be effected or not, he shall be punished by imprisonment in the penitentiary not exceeding ten years." § 11049. § 11050 makes it a misdemeanor to render such assistance to one detained for a criminal offense other than a felony. § 12157 provides a penalty of from two to ten years for aiding a prisoner to escape from the penitentiary. The penalty is one to five years for aiding escape from other state institutions (except that the jury may reduce it to a period of less than one year in the jail or workhouse). §§ 11052-3. An escape or attempt to escape from custody while going to and from the penitentiary or while in court is punishable as though made from the penitentiary. § 12178.

7. This word, so used from ancient times, is much more appropriate to express this idea than the word "jurisdiction," which means "to speak the law." Blackstone, speaking of the sheriff, says: "As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick; for so his county is frequently called in the writs; a word introduced by the princes of the Norman line; in imitation of the French, whose territory is divided into bailiwicks, as that of England into counties." 1 BL. COMM. \*344. It has been modified to indicate the official territory of any peace officer whether it is the county or some larger or smaller area. There was a tendency at one time to use other words for the official territory of other officers. Hale, for example, speaks of the "constablewick." 1 HALE P. C. \*582. But this usage has disappeared.

8. RESTATEMENT, TORTS § 116 (1934). A breach of the peace is an offense "which disturbs or threatens to disturb the tranquillity enjoyed by the citizens." *Head v. State*, 131 Tex. Cr. 96, 99, 96 S. W. 2d 981, 983 (1936).

9. This usage grew out of the fact that indictments in the early days concluded with some such phrase as "against the peace of our lord the King." See *Rawlins v. Ellis*, 16 M. & W. 172, 173, 153 Eng. Rep. 1147 (Ex. 1846).

10. §§ 11609-11620. After an indictment is returned into court the judge may direct the arrest of any defendant present, without process. § 11608. A *capias* is not issued for a defendant who is in actual custody at the time, or who has been released on bail (unless the undertaking of bail has been declared forfeited). § 11609. This is in accord with ancient terminology. See 1 HALE P. C. \*576.

At common law the word "*capias*" was also the name of either of two writs issued for the purpose of securing the person of a defendant in a civil action (mesne process—*capias ad respondendum*; final process—*capias ad satisfaciendum*). "*Capias pro fine*" was a writ for the arrest of a defendant who had not paid a fine which had been imposed upon him. "*Capias ad audiendum judicium*" was a writ to bring a defendant found guilty of a misdemeanor before the court to receive sentence. After he had once appeared, his presence at the trial (for a misdemeanor) was unnecessary but was imperative at the rendition of judgment.

11. *E.g.*, *United States v. Petti*, 168 F. 2d 221 (2d Cir. 1948).

12. "A capital offense is one where the punishment may be death. . . . The term includes a crime which may be punished, in the discretion of the jury, with the penalty of death." *Lee v. State*, 31 Ala. App. 91, 13 So. 2d 583, 587 (1943).

*Confinement* is restraint of the person by physical barriers or physical force, or by threats of force or assertion of authority which result in submission.<sup>13</sup>

A *crime* is any social harm defined and made punishable by law.<sup>14</sup>

*Custody* is safekeeping. (Hence to say a person has been taken into custody is equivalent to saying he has been taken prisoner.)<sup>15</sup>

*Deadly force* is force either intended or likely to produce death or great bodily harm,—whether it actually has such an effect or not.

An *escape* (in the technical sense of a common law crime) is unauthorized departure from legal custody.<sup>16</sup>

An *escape* (in the broad sense) is either unauthorized departure from legal custody or avoidance of arrest by flight.<sup>17</sup>

(*Escapee*). This word is frequently used to indicate a former prisoner who has escaped from custody. Those who use it probably think they are using a word comparable to "parolee," "draftee," or "employee." The difference is basic. A "parolee" is not the one who granted the parole; a "draftee" did not do the drafting; and an "employee" did not do the employing. The employee does the work but that makes him a *worker*,—not a *worker*. If a new term must be invented those who are careful in the use of words will say "escaper" (or possibly "escapist"),—not "escapee." (See "fugitive.")

*Extradition* is the surrender of a fugitive or prisoner by one state or nation to another.<sup>18</sup>

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13. RESTATEMENT, TORTS §§ 36-41 (1934).

14. "The word 'crime' of itself includes every offence, from the highest to the lowest in the grade of offences, and includes what are called 'misdemeanors,' as well as treason and felony." *Kentucky v. Dennison*, 24 How. 66, 99, 16 L. Ed. 717 (U. S. 1860).

15. "Custody has been held to be nothing less than actual imprisonment." *State ex rel. Bricker v. Griffith*, 36 N. E. 2d 489, 491 (Ohio App. 1941).

16. 4 BL. COMM. \*129. "If any person confined in a county workhouse or jail upon any charge of or conviction for a criminal offense, or otherwise lawfully so confined, shall escape or attempt to escape therefrom, he shall be guilty of a misdemeanor; and any term of imprisonment imposed upon any person convicted of such offense shall begin at the expiration of his original term." § 11054. "If any convict, imprisoned in the penitentiary for a term less than life, escape or attempt to escape, he shall be indicted for an escape, and, on conviction, punished by imprisonment in such penitentiary for a term not exceeding five years, to commence from and after the expiration of the original term." § 12151. Escape by a "lifer" is punished by solitary confinement not to exceed two years to be served at such intervals as the court may direct. § 12154. The words "or otherwise lawfully so confined," as used in § 11054, have been construed to include one lawfully confined in quarantine. See *State v. Head*, 182 Tenn. 249, 253, 185 S. W. 2d 530, 531 (1945). If these words do not also include one lawfully in the custody of an officer while on the way to a magistrate or to jail, the unlawful departure from such custody would no doubt be punishable as a common law offense. Compare the dictum in *State v. Wright*, 164 Tenn. 56, 58, 46 S. W. 2d 59, 60 (1932).

17. "The term 'escape' is not to be taken in its technical sense, which would imply, as is argued, that the person was previously in custody of the officer, and had eluded his vigilance. It must be understood in its popular sense, which is, 'to flee from, to avoid, to get out of the way,' etc." *Lewis v. State*, 40 Tenn. 127, 147 (1859); *Love v. Bass*, 145 Tenn. 522, 529, 238 S. W. 94, 96 (1921); *Life & Casualty Insurance Co. v. Hargraves*, 169 Tenn. 388, 391, 88 S. W. 2d 451, 452 (1935).

18. "Extradition may be sufficiently defined to be the surrender by one nation to

*False arrest* is unlawful restraint of personal liberty for the actual or purported purpose of securing the administration of the law.<sup>19</sup>

*False imprisonment* is unlawful restraint of personal liberty.<sup>20</sup>

(Note. False arrest is false imprisonment. Ordinary kidnaping is false imprisonment but is not false arrest.)

A *felony* is a crime punishable by imprisonment in the penitentiary or by death.<sup>21</sup>

A *frisk* is a hasty search made by passing the hands over the clothing of the person being searched in order to determine quickly whether or not any deadly weapons are concealed there.<sup>22</sup>

A *fugitive* is a runaway. In law, the word is used to refer to a person who has either committed a crime, or is charged with crime, and has eluded arrest by flight or concealment, or has escaped from lawful custody. In recent times it has been used most frequently to refer to such a one who has departed from the jurisdiction, but there is no requirement that a runaway must cross the boundary line to become a "fugitive."<sup>23</sup>

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another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." *Terlinden v. Ames*, 184 U. S. 270, 289, 22 Sup. Ct. 484, 46 L. Ed. 534 (1902).

19. See RESTATEMENT, TORTS § 118, comment b (1934).

20. See RESTATEMENT, TORTS §§ 35-43 (1934); *McGlone v. Landreth*, 195 P. 2d 268 (Okla. 1948).

21. § 10752. "All violations of law punished by imprisonment in the penitentiary or by the infliction of the death penalty, are, and shall be denominated felonies; . . ." While the language of this section may be somewhat archaic it definitely does not mean that the application of the label "felony" is dependent upon what happens in the particular case. If the offense may be punished by imprisonment in the penitentiary it is a felony even if some milder penalty is actually applied. See, for example: "Felonies, to which section 7206 of Shannon's Code relates, are not punishable by imprisonment in the penitentiary if, in the opinion of the jury, they merit a less punishment than twelve months in the penitentiary." *State v. Chadwick*, 131 Tenn. 354, 358, 174 S. W. 1144, 1145 (1914).

Authority to arrest for felony is quite different from authority to arrest for misdemeanor as explained, *infra*, in the text. There are other important differences at this point in the procedure, such as the degree of force which may be used in making an arrest. Because of these facts postponement of the determination of the grade of the crime until after conviction would be utterly unworkable. Some states provide by statute that where a crime is punishable either by imprisonment in the penitentiary or by a milder penalty, it shall be deemed a misdemeanor after a judgment other than imprisonment in the penitentiary. CAL. PEN. CODE § 17 (Deering, 1941); *People v. Hamilton*, 198 P. 2d 873 (Cal. 1948). This is both workable and desirable, but such offense must be deemed a felony before judgment. See *State v. Rader*, 94 Ore. 432, 454, 186 Pac. 79, 81 (1919).

22. At least one court attempts to distinguish between "frisk" and "search." "The work 'frisk' signifies the running of hands rapidly over the person of another. The police have their own interpretation of the word, which is the passing of hands up and down and all around the individual and includes the placing of the fingers in the pockets of the person 'frisked,' and removing anything which may be desired. To search is to 'strip' and examine the contents more particularly, . . ." *Kalwin Business Men's Ass'n v. McLaughlin*, 126 Misc. 698, 701, 214 N. Y. Supp. 99, 102 (Sup. Ct. 1926).

23. "It was not essential that he should have left the state before he could be regarded as a fugitive from justice. One who commits an offense and conceals himself to avoid arrest, is a fugitive from justice. If he successfully hides or conceals himself so as to evade punishment for his crime, although such concealment may be upon his own

*Imprisonment* is intentional confinement of another.<sup>24</sup>

*Incarceration* is imprisonment in a place of confinement,—as in a jail.

*Incommunicado*. A prisoner is held *incommunicado* if he has no opportunity to communicate with persons other than his jailers.<sup>25</sup>

"The *information* is the allegation made to a magistrate that a person has been guilty of some designated public offense."<sup>26</sup>

*Magistrate*. "The following are magistrates within the meaning of this chapter: (1) The judges of the supreme court, (2) the judges of the circuit and criminal courts, (3) justices of the peace, (4) police and other special justices appointed or elected in a city, village, or town, (5) the mayors and recorders of cities and towns upon whom criminal jurisdiction is conferred by law."<sup>27</sup>

A *misdemeanor* is any crime other than a felony.<sup>28</sup>

A *mittimus* is a written order by a competent officer directing a jailer to receive and keep safely a specified prisoner until he is delivered by due cause of law.<sup>29</sup>

*Nondeadly force* is force neither intended nor likely to produce death or great bodily harm.<sup>30</sup>

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premises, he is as much a fugitive from justice as if he had escaped into Canada." State v. Harvell, 89 Mo. 588, 590, 1 S. W. 837, 838 (1886).

However, in the law of extradition, by definition, a fugitive from justice is: "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, . . ." U. S. CONST. Art. IV, § 2; 18 U. S. C. § 3182 (1948). "A fugitive from justice, within the sense of this inquiry [extradition], is necessarily one who, being charged with crime in the demanding state, has fled therefrom." State *ex rel.* Lea v. Brown, 166 Tenn. 669, 673, 64 S. W. 2d 841, 842 (1933). § 11927 provides that such a fugitive may be arrested with or without a warrant by any officer, who must take him before a committing magistrate; and if the arrest is without a warrant, one shall be sworn out which may be done on information and belief.

24. One who was wrongfully held in slavery was "imprisoned." Downs v. Allen, 78 Tenn. 652, 662 (1882): "[A]n arrest is an imprisonment." Blight v. Meeker, 2 Halst. 97, 98 (N. J. L. 1823).

25. See Wynn v. State, 181 Tenn. 325, 327, 181 S. W. 2d 332 (1944).

26. § 11512 (italics added). In some jurisdictions an "information" is a written accusation of crime which may perhaps serve any one of three purposes: (1) a complaint before a magistrate which may be the basis for the issuance of a warrant of arrest; (2) an accusation of a nonindictable offense; or (3) a charge prepared by a prosecuting officer in lieu of an indictment where this procedure is permitted. See State v. Porter, 206 Iowa 1247, 220 N. W. 100 (1928). FED. R. CRIM. P., 3: "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before the commissioner or other officer empowered to commit persons charged with offenses against the United States."

27. § 11514. § 11513 reads: "A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense." Compare § 11428.

28. § 10752: ". . . and all violations of law punished by fine or imprisonment in the county jail or workhouse, or both, shall be denominated misdemeanors." If the punishment provided by law *may be* imprisonment in the penitentiary the crime is a felony. See *supra*, "felony" and the footnote thereto. Hence it would be simpler now if this section should be amended to read (after the definition of felonies) "all other offenses shall be denominated misdemeanors."

29. 2 CO. INST. \*591. "If it appear that an offense has been committed, and there is probable cause to believe the defendant guilty thereof, he shall be committed to jail, by an order in writing, unless the offense is bailable, and the defendant gives sufficient bail as required for his appearance at court." § 11562. This "order in writing" is the mittimus.

30. Such force is "nondeadly force" even if it should quite unexpectedly prove fatal.

*Offense.* The word "offense" is frequently used as a synonym of "crime," although at other times it is given a somewhat broader meaning.<sup>31</sup> (See public offense.)

*Officer* (as used herein) means a peace officer.

"A *peace officer* is a person designated by public authority, whose duty it is to keep the peace and arrest persons guilty or suspected of crime."<sup>32</sup>

*Permitting escape* (in the sense of a crime under the code) is an escape resulting from voluntary and corrupt cooperation of the officer in charge of the prisoner.<sup>33</sup>

*Process.* One meaning of process, as it is used in the law, is a means of compelling a defendant to appear in court. Thus a warrant of arrest is one form of "process."<sup>34</sup>

A *public offense* is a crime, either felony or misdemeanor.<sup>35</sup>

31. "An offense which is pursued at the discretion of the injured party or his representative is a civil injury. An offense which is pursued by the sovereign or the subordinate of the sovereign is a crime." (Citing *Cooley on Torts*.) *Jernigan v. Commonwealth*, 104 Va. 850, 852, 52 S. E. 361, 362 (1905).

32. RESTATEMENT, TORTS § 114 (1934) (italics added). "The power of the ordinary peace officer to arrest and to seize does not seem to have been conferred originally by statute. . . . These powers, including of course the power to arrest, are in this country thought to inhere in these offices [sheriff, constables, watchmen] except in so far as they may be limited by statute." *Maul v. United States*, 274 U. S. 501, 524, n. 27, 47 Sup. Ct. 735, 71 L. Ed. 1171 (1927). "It must be conceded that 'peace officer' is an exceedingly comprehensive term, embracing public officials of practically every class and position, Judges of all degrees, policemen, mayors, aldermen, etc. etc., whether county, municipal or State representatives." (Because § 11419 authorizes them to act with all the power of the sheriff.) *Vickers v. State*, 176 Tenn. 415, 419, 142 S. W. 2d 188, 189 (1940).

33. "If any officer or other person having another in custody under a lawful arrest or conviction for a felony, voluntarily, corruptly, and of purpose, let such person escape, he shall be imprisoned in the penitentiary not less than two nor more than ten years." § 11047. § 11048 makes it a misdemeanor to permit the escape of one lawfully in custody on a charge or conviction of misdemeanor. § 12160 provides a severe penalty for voluntarily permitting a convict to escape from the penitentiary.

Anciently this offense was called "escape" and it included also an escape resulting from the culpable negligence of the officer. "[E]scapes are of three kinds: By the person that hath the felon in his custody, and this is properly an escape; . . ." 1 HALE P. C. \*590. Lord Hale's reference to this as "properly an escape" suggests that an officer who wilfully or negligently permitted his prisoner to escape was considered guilty of an offense long before the one who departed from lawful custody without authority was punishable for this departure. When the prisoner himself came to be regarded as guilty of crime because of his unauthorized departure, the word "escape" was used quite logically as the name of his offense. For generations it was retained also as the name of the crime committed by the officer. If the officer wilfully permitted his prisoner to depart, without authority, he was guilty of "voluntary escape," which might be treason, felony or misdemeanor, depending upon the guilt of the prisoner. Wilfully permitting a traitor to escape was treason; wilfully permitting a felon to escape was sufficient for guilt of the same felony as accessory after the fact; wilfully permitting the escape of a misdemeanant, or one lawfully in custody although not guilty of the original offense charged, was a misdemeanor. An officer who negligently permitted his prisoner to get away was guilty of "negligent escape" which was a common law misdemeanor. 4 BL. COMM. \*129-30.

34. In the strict sense "process" is a means of compelling a defendant to appear in court, *after the original writ*, which would mean after the indictment in a criminal case. In this sense a *capias* is process whereas a magistrate's warrant would not be. The word has come to be used without this distinction, however. "A writ is process and process is a writ, interchangeably." BALLENTINE, COLLEGE LAW DICTIONARY 664 (1931).

35. *State v. Allphin*, 2 Kan. App. 28, 33, 42 Pac. 55, 57 (1895). "The term 'public



*Rescue* is the forcible release of a prisoner from lawful custody.<sup>36</sup>

*Resisting arrest* is wilful opposition, by force or menace, to an arrest known to be lawful.<sup>37</sup>

*Resisting process.* "Any person who knowingly and willfully opposes or resists an officer of the state, or other authorized person, in serving, or attempting to serve or execute, any legal writ or process, shall be guilty of a misdemeanor."<sup>38</sup>

A *return* (in law) is an official statement by an officer of what he has done in obedience to a command from a superior.<sup>39</sup>

The *return of a warrant of arrest* is a short written account, indorsed on the warrant, of the manner in which the officer executed the warrant, or of the fact that he was unable to execute it.<sup>40</sup>

A *summons* is a writ issued by a magistrate to be served upon a defendant for the purpose of securing his appearance in the action.<sup>41</sup>

A *ticket* (in criminal procedure) is a written notice issued by an officer, to one accused by him, directing the accused to make a specified appearance to answer this charge.<sup>42</sup>

A *warrant* (as used herein) is a warrant of arrest.

"A *warrant of arrest* is an order, in writing, stating the substance of the complaint, directed to a proper officer, signed by a magistrate, and commanding the arrest of the defendant."<sup>43</sup>

offense' in this territory, has the same meaning as the word 'crime,' and they may be used interchangeably." Territory v. West, 4 Ariz. 212, 215, 36 Pac. 207, 208 (1894).

36. "Any person who shall, by force or menace, or by any other unlawful means, rescue, or attempt to rescue, anyone who is in custody after a lawful arrest, either before or after conviction for a felony, knowing or being informed that the offender is under lawful arrest, shall be imprisoned in the penitentiary not less than one nor more than ten years." § 11045. § 11046 makes it a misdemeanor to rescue one who is in custody for a misdemeanor. Blackstone gives this definition and explanation of the common law offense: "Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing as it would have been in a gaoler to have *voluntarily* permitted an escape." 4 BL. COMM. \*131.

37. Such opposition would constitute "resisting process" in violation of § 11044 if the arrest was under a valid warrant. If the arrest resisted was lawful, but without a warrant, the resistance would not come under § 11044 but would be punishable as a common law crime. See State v. Wright, 164 Tenn. 56, 46 S. W. 2d 59 (1932).

38. § 11044. An indictment for this offense must show (1) the official character of the officer, (2) that he was acting lawfully, and the nature of the resistance by reciting facts relative thereto. State v. Wright, 164 Tenn. 56, 46 S. W. 2d 59 (1932).

39. "The return of an officer is the written statement of what he has done under the process in his hands." Davis v. Reaves, 75 Tenn. 585, 590 (1881). The return cannot be attacked collaterally. Hutton v. Campbell, 78 Tenn. 170 (1882).

40. See § 11530.

41. Originally a summons was used only in civil actions but at the present time many jurisdictions make use of it in lieu of arrest in certain criminal cases. In Tennessee all civil actions, with certain exceptions, are commenced by summons. § 8645. For the use of the summons in criminal actions, see A. L. I. CODE OF CRIMINAL PROCEDURE 217-226 (Official Draft with Commentaries, 1931).

42. The "ticket" made its first appearance in the enforcement of traffic violations but is not necessarily limited to that field. It is occasionally referred to as a "summons" but it is preferable to restrict that word to the writ issued by a magistrate and to retain the popular label "ticket" for the notice issued on the spot by an officer.

43. § 11521 (*italics added*). "A warrant is a written order directing the arrest of

A *writ* is a written mandate, issued by the authority and in the name of the state, for the purpose of compelling the person to whom it is issued to do something therein mentioned.

### B. The Purpose of Arrest

In the early days arrest was a common method of beginning a civil proceeding.<sup>44</sup> It was used for this purpose in Tennessee at one time<sup>45</sup> but not at present.<sup>46</sup> The most common purpose of arrest is to bring an actual or

a person or persons, issued by a court, body or official, having authority to issue warrants." RESTATEMENT, TORTS § 113 (1934). The Tennessee Code places the emphasis upon the magistrate as the one who issues "warrants." §§ 11513, 11517, 11518, 11520, 11521, 11553. And these are "warrants" in the narrowest sense of the word. Under specified circumstances other types of process may be issued for the arrest of a person as explained in a footnote to "issuance of the warrant," *infra*. Such writs are not "warrants" within the meaning of Article I, section 7, of the Constitution of Tennessee, imposing special limitations upon the issuance of "warrants." On the other hand, apprehension in obedience to any such process is an "arrest under a warrant" as this phrase is used in the code. For this peculiar shift in the meaning of the word see *infra*, Section III, D, "Authority to Arrest—Without a Warrant."

44. 3 BL. COMM. \*279-283.

45. *Capias ad respondendum*, Dwyer v. Foster, 12 Tenn. 532 (1883); Posey v. McCubbins, 13 Tenn. 234 (1833); Woodfin v. Hooper, 23 Tenn. 13 (1843). *Capias ad satisfaciendum*, Tipton v. Harris, 7 Tenn. 414 (1824); Gale v. Snapp, 9 Tenn. 84 (1825); Hampton v. State, 9 Tenn. 493 (1831); Hubbard v. Cole, 17 Tenn. 501 (1836).

46. At common law civil arrest was used both to commence the suit, by a writ of *capias ad respondendum*, and to satisfy a judgment, by a writ of *capias ad satisfaciendum*. 3 BL. COMM. \*414, 415. Both of these writs were used in North Carolina in the early days. For example, the statutes of that state, 1777, c. 2, §§ XVI, LXXVI, authorized bail to be received by any officer who was commanded to arrest a defendant to answer the plaintiff in "any action" or in "any civil action," and the statutes of 1741, c. 18, and 1759, c. 14, dealt with prisoners for debt. By North Carolina statute 1789, c. 3, certain land was ceded to the United States. This became the territory of Tennessee which was accepted into the Union as a state in June, 1796. The North Carolina cession statute [accepted in toto by Congress, 1 STAT. 106 (1790)] provided that all laws in effect in North Carolina should continue in effect in the new territory until changed. A statute passed by the Territorial Assembly, 1794, c. 1, § 11, provided for bail for one arrested in a civil action; and the first Tennessee Constitution, Art. XI, § 18 (1796), authorized the release of one imprisoned for debt after he had delivered his property to his creditor, unless there was a strong presumption of fraud.

Civil arrest was greatly restricted by the Act of 1831, c. 40. Section one abolished imprisonment of women for debt either by mesne process (the writ of *capias ad respondendum*) or by final process (the writ of *capias ad satisfaciendum*). Section two, the origin of the present summons, provided that the commencement of all civil actions at law on any debt or contract made after March 1, 1832, with certain exceptions, should be by a summons to the defendant who was not required to give bail. The main exception, contained in section three, was that if the plaintiff made an affidavit that his cause was just and that defendant had removed, or was about to remove, his property out of the jurisdiction of the court, a *capias ad respondendum* would issue. Section five of this chapter abolished the writ of *capias ad satisfaciendum* except where the plaintiff made an affidavit that the defendant had removed, or was about to remove, his property from the jurisdiction of the court, or had fraudulently conveyed or concealed his property, or had money sufficient to satisfy the judgment but refused to do so. The restriction of section two of this chapter did not include tort actions since it spoke of "actions at law on any debt or contract," but this omission was corrected by the Act of 1832, c. 12, § 4, providing that the Act of 1831, c. 40 "shall extend to all civil actions, whether founded upon contract or otherwise. . . ." The Act of 1842, c. 3, abolished the writ of *capias ad satisfaciendum* entirely, and the last trace of civil arrest seems to have disappeared with the adoption of the official Code of Tennessee, 1858. Section 2813 of that code (present § 8645 of Williams' Code Annotated) provided: "All civil actions at law in courts of record, or before Justices of the Peace, except otherwise provided, shall be commenced by summons." And no authorization for civil arrest was "otherwise provided."

supposed criminal before a magistrate or court for hearing or trial, or to subject one previously convicted to the penalty imposed upon him. It may be used also, however, to bring in a person who has committed contempt of court,<sup>47</sup> ignored a summons, or disobeyed a subpoena.<sup>48</sup>

## II. WHAT CONSTITUTES ARREST <sup>49</sup>

Arrest requires imprisonment. At one point the law recognizes constructive imprisonment, but since most arrests involve actual imprisonment it is well to start at that point.

### A. Actual Imprisonment

If an officer arrests an offender and takes him to headquarters, the layman usually does not think of the offender as having been *imprisoned* until he is securely behind locked doors; but he does not hesitate to speak of the offender as a *prisoner* from the moment of apprehension. As a matter of law the offender was imprisoned as soon as the arrest was made, and he is designated a "prisoner" because of this fact. In the legal sense there may be "confinement" of a person not only by locking him in the public jail or in a private house "or in the stocks," but even by forcibly detaining him in the public streets.<sup>50</sup> One is not confined merely because he is prevented from going in some one direction, or in several directions, as long as he may freely depart by some other known way;<sup>51</sup> but he may be confined either by being restrained by physical barriers<sup>52</sup> or physical force,<sup>53</sup> or by being subjected to

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The Tennessee Constitution of 1870, Art. I, § 18, declares: "The Legislature shall pass no law authorizing imprisonment for debt in civil cases." The history back of this clause is suggestive of a purpose to outlaw civil arrest entirely. The general rule is that the wording used would not forbid a statute authorizing arrest in civil actions *ex delicto*. Notes, 34 L. R. A. 634 (1897), 20 Ann. Cas. 1344 (1911). Tennessee, however, has no such statute and is not likely to have one. Civil arrest is still recognized for some purposes in certain states. *Burns v. Newman*, 274 App. Div. 301, 83 N. Y. S. 2d 285 (1st Dep't 1948).

47. RESTATEMENT, TORTS § 120(a) (1934).

48. § 10119 provides for the issuance of attachments (writs of arrest) for wilful disobedience or resistance of any witness to any lawful writ, process, order, rule, decree, or command of the several courts. *State v. Reinhart*, 92 Tenn. 270, 21 S. W. 524 (1893) was a case in which witnesses subpoenaed to appear and testify in a criminal proceeding refused to obey, whereupon they were arrested under "attachments" and brought into court.

49. Problems in this part of the field are discussed in Coates, *The Law of Arrest in North Carolina*, 15 N. C. L. REV. 101 (1936); Coughlin, *Arrest Without Warrant*, 5 JOHN MARSHALL L. Q. 352 (1940); Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 334 (1942); Notes, 67 Am. St. Rep. 408 (1899), 1 Am. L. REG. (N.S.) 476 (1862); 37 MICH. L. REV. 311 (1938).

50. See *Floyd v. State*, 12 Ark. 43, 47 (1851). Illegally detaining a traveler on the street is false imprisonment. *Travis v. Bacherig*, 7 Tenn. App. 638 (M. S. 1928).

51. RESTATEMENT, TORTS § 36 and comment *d* (1934).

52. RESTATEMENT, TORTS § 38 (1934). "[I]f a bailiff comes into a room, and tells the defendant he arrests him, and locks the door, that is an arrest, for he is in custody of the officer." Per Lord Hardwicke, in *Williams and Jones and Others*, Cas. t. Hard. 299, 301, 95 Eng. Rep. 193, 194 (K. B. 1736).

53. RESTATEMENT, TORTS § 39 (1934).

threats of physical force<sup>54</sup> or an asserted legal authority<sup>55</sup> to which he submits.<sup>56</sup> Confinement is not necessarily stationary. One might be locked in a moving ship<sup>57</sup> or be "confined" by being forcibly removed from one place to another.<sup>58</sup>

Every intentional<sup>59</sup> confinement of another amounts to imprisonment<sup>60</sup> unless it is a very temporary confinement properly incident to the exercise of some privilege. Even momentary confinement, although not for the purpose of custody but merely incidental to the accomplishment of something else, will constitute false imprisonment if done intentionally and without lawful authority.<sup>61</sup> Furthermore, every intentional confinement of another (subject to the exception mentioned) constitutes actual imprisonment, as this term is used in the law, whether it is accomplished by physical control or coerced submission.

### B. Constructive Imprisonment

If an officer (or a private person), having authority to make an arrest, actually touches his arrestee for the manifested purpose of apprehending him, the arrest is complete<sup>62</sup> "although he does not succeed in stopping or holding him even for an instant."<sup>63</sup> Without doubt this rule was established to enlarge the scope of the common law crime of *escape* to include the flight of the arrestee after having been notified and touched by one having authority

54. RESTATEMENT, TORTS § 40 (1934). "If the intentional conduct of defendants towards plaintiff and his wife was such as to induce a reasonable apprehension in the mind of plaintiff that force would be used if he did not submit, and acting on such apprehension he did submit, the detention would be complete, so as to sustain this action." *Burk v. Knott*, 20 Ala. App. 316, 319, 101 So. 811, 813 (1924).

55. RESTATEMENT, TORTS § 41 (1934).

56. "An arrest is the taking, seizing or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest." *Robertson v. State*, 184 Tenn. 277, 284, 198 S. W. 2d 633, 635 (1947). An unlawful arrest may be effected without touching if there is submission to asserted authority. *Hoppes v. State*, 70 Okla. Cr. 179, 105 P. 2d 433 (1940).

57. RESTATEMENT, TORTS § 36, comment *c* (1934).

58. *People v. Wheeler*, 73 Cal. 252, 14 Pac. 796 (1887). "If the actor by force or threats thereof or by exerting legal authority compels another to accompany him from place to place, he has as effectively confined another as though he had locked him in a room." RESTATEMENT, TORTS § 36, comment *c* (1934).

59. Negligent confinement of another is not spoken of as "imprisonment." RESTATEMENT, TORTS § 35 (1934).

60. *Floyd v. State*, 12 Ark. 43 (1851).

61. It will constitute an unlawful arrest. *Robertson v. State*, 184 Tenn. 277, 198 S. W. 2d 633 (1947); *Smith v. State*, 182 Tenn. 158, 184 S. W. 2d 390 (1945); *Cox v. State*, 181 Tenn. 344, 181 S. W. 2d 388 (1944). For comments on a dictum in the *Robertson* case, indicating that such a momentary stopping would be an "arrest" even if merely incidental to the exercise of a lawful privilege, see *infra* under "momentary detention incidental to the exercise of a privilege," in Section II, D, "Concepts Distinguished from Arrest."

62. 1 EAST P. C. \*300, 330; *Whithead v. Keyes*, 85 Mass. 495 (1862); RESTATEMENT, TORTS § 112, comment *a* (1934).

63. *State ex rel. Sadler v. District Court*, 70 Mont. 378, 386, 225 Pac. 1000, 1002 (1924).

to arrest him. Since such a one is regarded as having wrongfully departed from lawful imprisonment,—although he was not actually detained or confined even for an instant—we are forced to recognize it as constructive imprisonment.<sup>64</sup>

### C. Purpose of Imprisonment

Every imprisonment effected for the actual or purported purpose of securing the administration of the law is an arrest.<sup>65</sup> Four requisites of arrest have been suggested: "A purpose to take the person into the custody of the law; under a real or pretended authority; an actual or constructive seizure or detention of his person; so understood by the person arrested."<sup>66</sup> These may be accepted with very slight qualification.<sup>67</sup> Ordinarily there is no arrest without such an intention on the part of the arrestee;<sup>68</sup> but if officers by their words and manner cause a reasonable belief on the part of another that he must accompany them or suffer consequences for failure to do so, and he does accompany them in submission to the apparent threats or assertion of authority, he has been arrested.<sup>69</sup> Hence the first requisite should no doubt read: "An actual or apparent purpose to take the person into the custody of the law."<sup>70</sup>

### D. Concepts Distinguished from Arrest

The borderline between arrest and no arrest, where there has been a manifested purpose to take a person into custody, may be illustrated in this form: *A* approached *B* with a statement of authority and intent to arrest him and ordered him to come with *A*.

(1) If *B* submitted to the asserted authority and accompanied *A* this

64. "... constructive seizure or detention of his person." State *ex rel.* Sadler v. District Court, 70 Mont. 378, 386, 225 Pac. 1000, 1002 (1924).

65. RESTATEMENT, TORTS § 112 (1934).

66. State *ex rel.* Sadler v. District Court, 70 Mont. 378, 386, 225 Pac. 1000, 1001-2 (1924).

67. It is possible to have a lawful arrest without the arrestee knowing that he has been taken into the custody of the law. One, for example, who is unconscious at the time, by reason of intoxication or otherwise, or who cannot understand the language, may be taken into custody and receive the necessary information later. RESTATEMENT, TORTS § 128, comment *f* (1934).

68. Jones v. Jones, 35 N. C. 448 (1852). The officer's intention may have a bearing on the lawfulness of the arrest also. If an officer arrests a man, not for the purpose of taking him before a magistrate, but to compel him to turn property or money over to another person, the arrest is unlawful. RESTATEMENT, TORTS § 127, and illustrations (1934).

69. See Brushaber v. Stegemann, 22 Mich. 266, 268 (1871); Note, 19 Am. Dec. 485 (1880).

70. No doubt the fourth requisite is subject to a possible exception. One cannot recover damages for alleged false imprisonment based upon a confinement of which he was entirely unaware. RESTATEMENT, TORTS § 42 (1934). But if officers with a warrant should find the accused while he was "dead drunk" or otherwise unconscious, put him in the squad car, take him to headquarters and lock him up, they could properly fill out the return to the effect that the accused had been arrested without waiting for him to regain consciousness and understand his situation. Cf. Zimmer v. State, 64 Tex. Cr. 114, 141 S. W. 781 (1911).

was an arrest (actual imprisonment) whether *A* in fact had authority to arrest *B* or not and whether he touched *B* or not.<sup>71</sup>

(2) If *B* did not submit but instantly ran, getting entirely away from the presence of *A*, this was—(a) an arrest if *A* had authority to arrest *B* and actually touched him, however lightly (constructive imprisonment);<sup>72</sup> or (b) not an arrest if *A* either lacked authority or failed to touch *B* (no imprisonment either actual or constructive).<sup>73</sup>

Needless to say, an arrest would be possible, without either touching or submission, by the effective use of physical barriers,—as by locking the arrestee in a room.<sup>74</sup> This is the clearest case of actual imprisonment and hence not near the borderline. Let attention now be directed to certain acts that do not constitute arrest.

*Words alone.* Mere words alone cannot constitute either imprisonment or arrest. An occasional statement to the contrary has resulted from a failure to distinguish between words resulting in submission and the bare words themselves.<sup>75</sup>

71. RESTATEMENT, TORTS § 41 (1934). "The taking of another into custody under such an authority is an arrest whether the authority be valid or invalid." *Id.* at comment *a*. It is false arrest with liability for false imprisonment if the asserted authority is invalid. *Id.* at § 118, comment *b*. See *Robertson v. State*, 184 Tenn. 277, 284, 198 S. W. 2d 633, 635 (1947). "If the defendant resist the arrest, then there must be some corporal touching of the body to make the arrest complete. But if the defendant submit, there is no more necessity to touch his body, than to knock him down or to tie him, both of which may be done if his resistance makes them necessary." *McCracken v. Ansley*, 4 Strob. 1, 5 (S. C. 1849).

72. RESTATEMENT, TORTS § 112, comment *a* (1934): "... any touching of another constitutes an arrest, if it is imposed for the purpose of making an arrest and such purpose is manifested in the manner stated in § 128" and "in the exercise of a privilege to arrest." See *Robertson v. State*, 184 Tenn. 277, 284, 198 S. W. 2d 633, 635 (1947).

73. RESTATEMENT, TORTS § 41, comment *b* (1934). If *A* touched *B* but without lawful authority to arrest him, the touching constitutes a battery but not false imprisonment. *Id.* § 118, comment *b*. If *A* had lawful authority to arrest *B* but did not touch him, there has been no escape, in the technical sense of a common law crime, because there has been no arrest (if he did not submit). *Russen v. Lucas*, 1 Car. & P. 153, 171 Eng. Rep. 1141 (N. P. 1824). Where an officer with a warrant went upon the premises of the one accused therein and said: "I arrest you," but the other, with a weapon in his hand, prevented the officer from touching him and retreated from the officer's presence there was no arrest because there was neither touching nor submission. *Genner v. Sparkes*, 1 Salk. 79, 91 Eng. Rep. 74 (K. B. 1704).

74. See *Williams and Jones and Others*, Cas. t. Hard. 299, 301, 95 Eng. Rep. 193, 194 (K. B. 1736); *Lawrence v. Buxton*, 102 N. C. 129, 8 S. E. 774 (1889).

75. *Smith v. State*, 219 S. W. 2d 454 (Tex. Cr. 1949). "A false imprisonment may be committed by words alone. . . ." *Martin v. Houck*, 141 N. C. 317, 324, 54 S. E. 291, 293 (1906). In this case the arrestee actually submitted to the asserted authority of the officer, and hence the court was thinking of words resulting in submission. If there are words on both sides, it is still the actual submission, rather than the statement that completes the arrest. "In the case at bar, it clearly appears that the plaintiff did not intend to pay the tax, unless compelled by an arrest of her person. The collector was so informed. He then proceeded to enforce the collection of the tax—declared that he arrested her—and she, under that restraint, paid the money. This is a sufficient arrest and imprisonment to sustain the action." *Pike v. Hanson*, 9 N. H. 491, 494 (1838). If the arrestee has not been touched and says, in effect, "I submit," while he is in the very act of running away, there would be no arrest. *Russen v. Lucas*, 1 Car. & P. 153, 171 Eng. Rep. 1141 (N. P. 1824). On the other hand if he actually submits for the present his secret intent to run away at the first opportunity would not prevent the completion of the arrest.

*Touching.* The slightest touching of the arrestee, coupled with the manifested purpose of taking him into custody, by one having authority to do so, completes the apprehension, as previously explained. On the other hand, touching the shoulder of the person accused in a warrant, by an officer having authority to execute it, does not constitute an arrest if the touching was not done for that purpose.<sup>76</sup> Obviously a touching accompanied by a *mere* request that the person go with the officer is not an arrest.<sup>77</sup> And under the sound rule even a "frisk," where reasonable under the circumstances for the protection of the officer, does not of itself constitute an arrest.<sup>78</sup>

*Stopping.* Stopping a person is often part of the act of arresting him, and may even determine the point at which the apprehension was made in a particular case.<sup>79</sup> On the other hand, although the word "arrest" is derived from origins which mean "to stop," and it is used in that sense for some other purposes, the mere act of stopping a man does not constitute an arrest as a matter of law.<sup>80</sup> A traffic officer, for example, who stops a motorist to permit school children to cross the street in safety, does not thereby make an *arrest*. As said by the court in reference to a momentary stopping for another proper purpose, a "law abiding citizen cannot have a valid objection to the inconvenience of being stopped, so long as he is accorded courteous treatment."<sup>81</sup> It may be added that the mere act of stopping another does not constitute imprisonment, either actual or constructive.<sup>82</sup>

*Accost.* A man who has merely been approached by an officer and questioned has been "accosted" but not "arrested,"<sup>83</sup> and stopping for questioning may be quite proper when an arrest would not be authorized.<sup>84</sup> Thus it was held

76. *Jones v. Jones*, 35 N. C. 448 (1852).

77. *Hershey v. O'Neill*, 36 Fed. 168 (C. C. S. D. N. Y. 1888). This problem is discussed *infra* in this section under "Securing Cooperation."

78. *Gisske v. Sanders*, 9 Cal. App. 13, 16, 98 Pac. 43, 44 (1908). This problem is discussed *infra* under Section VI, C, "Duties and Privileges of Arrestor—Search and Seizure."

79. "[T]he arrest was made when the officer commanded defendant to stop, and in obedience to that command defendant stopped." *State v. Dunivan*, 217 Mo. App. 548, 553, 269 S. W. 415, 417 (1925). The fact of arrest was beyond dispute. The statement quoted was made with reference to the time when the arrest was made, although the court did not regard the element of time a controlling factor.

80. *High v. State*, 217 S. W. 2d 774 (Tenn. 1949).

81. *State v. Hatfield*, 112 W. Va. 424, 427, 164 S. E. 518, 519 (1932).

82. This is true if he is not detained even if he may have to leave by turning back and retracing his steps when he should be permitted to go forward. RESTATEMENT, TORTS § 36, comment *d* and illustration 10 (1934). An occasional statement indicating the contrary must be read in the light of the facts involved. *See*, for example, *Travis v. Bacherig*, 7 Tenn. App. 638, 644-45 (M. S. 1928), in which the plaintiff was seized by the arm and arrested; *Bloomer v. State*, 35 Tenn. 66, 68-69 (1855), in which plaintiff was stopped at the point of a knife and detained until he turned over a certain paper; *Smith v. State*, 26 Tenn. 43, 44 (1846), in which not "going forward" meant not leaving the spot.

83. *State v. Gulczynski*, 32 Del. 120, 120 Atl. 88 (1922).

84. *Ibid.*; *Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43 (1908); *Hargus v. State*, 58 Okla. Cr. 301, 54 P. 2d 211 (1935); *State v. Zupan*, 155 Wash. 80, 283 Pac. 671 (1929); *State v. Hatfield*, 112 W. Va. 424, 164 S. E. 518 (1932); *see People v. Henne-man*, 367 Ill. 151, 10 N. E. 2d 649, 650-51 (1937).

not an arrest where officers drove a car alongside a pedestrian and questioned him,<sup>85</sup> or where an officer on foot overtook a person for interrogation.<sup>86</sup> As said by one author:

"Every day large numbers of persons are questioned by police officers. This questioning, without immediate arrest, is essential to proper policing. A man climbing into a window late at night may be the householder who has forgotten his key and does not want to disturb his wife, or he may be a burglar. . . . Under such circumstances, a passing officer ought to question the suspicious behavior."<sup>87</sup>

*Securing cooperation.* A sharp distinction must be drawn between coercing submission by threats of force or assertion of authority, on the one hand, and requesting cooperation on the other. Words which would indicate a mere request, if seen in print, may be accompanied by such an "or else" tone or conduct as to be clearly coercive; and submission thereto will have the same effect as if the threat was plainly worded.<sup>88</sup> If, however, a person accompanies an officer to the station at his mere request, and the officer did not use words or adopt an attitude reasonably leading the other to believe force would be used if compliance was not otherwise secured, there has been no arrest.<sup>89</sup>

*Momentary detention incidental to the exercise of a privilege.* It is frequently necessary for an officer to detain a person momentarily for some proper purpose.<sup>90</sup> If the detention is quite brief in duration and is not for the purpose of taking him into custody but is merely unavoidably incident to the exercise of a privilege, it is not spoken of as "imprisonment,"—although exactly the same deed done officiously by one having no authority to do so would constitute "false imprisonment."<sup>91</sup> There is no arrest without imprisonment.<sup>92</sup> Hence, if he acts with proper authority, an officer does not ar-

85. *Johnson v. State*, 118 Tex. Cr. 293, 42 S. W. 2d 421 (1931).

86. *Pena v. State*, 111 Tex. Cr. 218, 12 S. W. 2d 1015 (1928). Or when an officer approached a woman and asked her questions. *Campbell v. Commonwealth*, 203 Ky. 151, 261 S. W. 1107 (1924). Officers stopped a car and asked the driver if he had any liquor. He admitted that he had and was arrested for unlawful transportation thereof. A conviction was reversed on other grounds but the court pointed out that his admission "was before he was placed under arrest." *Morgan v. United States*, 159 F. 2d 85, 87 (10th Cir. 1947).

87. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320 (1942).

88. See *Brushaber v. Stegemann*, 22 Mich. 266, 268 (1871).

89. *Hershey v. O'Neill*, 36 Fed. 168 (C. C. S. D. N. Y. 1888); *Rezeau v. State*, 95 Tex. Cr. 323, 254 S. W. 574 (1923). "From the testimony in the case the jury might well have found that plaintiff voluntarily accompanied the officer to the station and consented to be searched. Under such circumstances there would be no arrest or false imprisonment." *Gunderson v. Struebing*, 125 Wis. 173, 178, 104 N. W. 149, 151 (1905).

90. "A detective in the discharge of his duties has the right to request of an individual to fully disclose his identity." *People on Complaint of Nannery v. Clarke*, 12 N. Y. S. 2d 8, 9 (N. Y. City Ct. 1939).

91. See *Arnold v. State*, 255 App. Div. 422, 425, 8 N. Y. S. 2d 28, 30 (3d Dep't 1938). Any force employed in the effort to have carnal knowledge of a woman against her will amounts to "detaining her." *McDaniel v. Commonwealth*, 213 S. W. 2d 1007, 1008 (Ky. 1948).

92. *Blight v. Meeker*, 2 Halst. 97 (N. J. L. 1823).



rest a motorist by detaining him momentarily to inspect his driver's license,<sup>93</sup> or to check the equipment or weight of his car or truck,<sup>94</sup> or to require identification within a proper police cordon,<sup>95</sup> or even to make an authorized search of the vehicle itself.<sup>96</sup> A dictum may be found in one Tennessee decision indicating that any stopping of an automobile by the authority of an officer is an arrest.<sup>97</sup> But the case was dealing with a stopping which was *not* authorized. As mentioned above, every intentional confinement of another amounts to imprisonment unless it is a very temporary confinement properly incident to the exercise of some privilege. As this stopping was not privileged it is outside the exception and hence constituted an "imprisonment." And as it was for the purpose of securing the administration of the law it was an "arrest." In a later case an authorized stopping of a motorist was held not to be an arrest.<sup>98</sup>

It would have been unfortunate if this casual dictum had become the

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93. Waite, *The Law of Arrest*, 24 TEX. L. REV. 279, 298 (1946). See Note, *Validity, Construction, and Application of Statute Regarding Failure or Refusal of Operator of Motor Vehicle to Display License on Demand*, 143 A. L. R. 1019 (1943).

94. Kauffman, *The Law of Arrest in Maryland*, 5 MD. L. REV. 125, 131-32 (1941). Authority of specified officers to require a truck to go to nearby scales to be weighed does not entitle other officers to do so. *Head v. State*, 131 Tex. Cr. 96, 96 S. W. 2d 981 (1936). A statute makes it the duty of one who fishes or hunts to permit the game and fish director or his conservation officers to inspect and count his catch or kill to see that he has not exceeded the statutory limit. § 5176.5. The officer could arrest a hunter who refused to permit such inspection, because the statute makes such refusal a misdemeanor. *Ibid.*; *State v. Hall*, 164 Tenn. 548, 51 S. W. 2d 851 (1932). But there has been no arrest if the officer requires a hunter to stop for such inspection, promptly inspects the kill and finds it within the limit, and permits the hunter to depart without undue delay.

95. "The duty to suppress crime and to arrest violators of the law, necessarily carries with it the right to stop persons for the purpose of identification. And this logically extends to those traveling on the highways in motor or other vehicles." *State v. Hatfield*, 112 W. Va. 424, 426, 164 S. E. 518, 519 (1932).

96. Under the former National Prohibition Act officers had authority, without a warrant, to search a car on the reasonable belief that the contents of the car violated the law. And in a very famous case the court said: "The right to search and the validity of the seizure are not dependent on the right to arrest." *Carroll v. United States*, 267 U. S. 132, 158, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925).

Under Tennessee law a search warrant for the search of a car does not authorize a search of the person unless such a direction is expressly included. *Parker v. State*, 177 Tenn. 380, 150 S. W. 2d 725 (1941).

But if the mere stopping or detaining of the car to make the search constituted an arrest of the driver he could be searched as an incident to the lawful arrest.

97. "The stopping of a car by an officer for the inspection of a driver's license, or for any purpose where it is accomplished by the authority of the officers, is in fact an arrest, even though it be a momentary one in some cases." *Robertson v. State*, 184 Tenn. 277, 284, 198 S. W. 2d 633, 635 (1947). The statute requiring that a motorist shall exhibit his driver's license upon demand of any state highway patrolman empowers a patrolman at any time to stop an automobile and require exhibition of the driver's license. *Cox v. State*, 181 Tenn. 344, 181 S. W. 2d 338 (1944). Other peace officers have no such power except where the driver has violated the law. But a stopping by members of the Highway Patrol (not otherwise authorized) is unlawful if it is actually for some other purpose and the inspection of the license is a mere pretext. *Cox v. State*, 181 Tenn. 344, 181 S. W. 2d 338 (1944); *Smith v. State*, 182 Tenn. 158, 184 S. W. 2d 390 (1945); *Robertson v. State*, 184 Tenn. 277, 198 S. W. 2d 633 (1947). It was in this latter case, one of those in which the inspection of the license was a mere subterfuge, that the dictum appears.

98. *High v. State*, 217 S. W. 2d 774 (Tenn. 1949).

law of Tennessee. It is wise by statute or police regulation to require a record to be kept of all arrests; but no one would want a record kept, in the arrest file, of all motorists who were asked to show their operator's licenses, and did so.

*Detention for questioning.* A person being questioned by an officer is not bound to incriminate himself,<sup>99</sup> but there is no immunity which entitles a mere witness to refuse to give information relative to the guilt of someone else, unless there is some special protection. Anciently, witnesses were punished for failure to give to officers, outside of the court room, information of any felony known to them.<sup>100</sup> While this is not common at the present time,<sup>101</sup> it is still the right of the officer to demand such information, and the duty of the citizen to answer fully<sup>102</sup> as long as what he says does not tend to incriminate himself or improperly divulge a privileged communication.<sup>103</sup> Fur-

99. *State v. Simpson*, 157 La. 614, 102 So. 810 (1925). When officers stopped defendant's car purportedly to check his driver's license but primarily to discover whether he was transporting intoxicating liquor, "the effect of defendant's apprehension was to require him to give evidence against himself, and therefore violated his constitutional rights." *Cox v. State*, 181 Tenn. 344, 347, 181 S. W. 2d 338, 340 (1944). In another case the prosecuting attorney brought a pan of mud into the court room and asked defendant to place his foot in it, the purpose being to obtain a footprint to compare with one found at the scene of the crime. The court instructed the defendant that he could put his foot in the mud if he wished, but would not be forced to do so; and he refused. The action of the prosecuting attorney was held to be calculated to influence the jury unduly, as it called upon defendant to furnish evidence against himself. *Stokes v. State*, 64 Tenn. 619 (1875).

Several exceptions are found in the Tennessee statutes to the rule that one may not be compelled to give evidence against himself. For example, § 172.8 applying to legislative investigating committees and § 1898 applying to investigations before the attorney-general or other specified officers leading to the removal of unfaithful public officers provide that no witness may refuse to testify on the ground that his testimony may incriminate him. However, to comply with the constitutional provision against self-incrimination both of these sections also provide that "no persons shall be prosecuted or punished on account of any transaction, matter, or thing concerning which he shall be compelled to testify." As to the extent of such immunity see *United States v. Daisart Sportswear*, 169 F. 2d 856 (2d Cir. 1948).

100. 4 BL. COMM. \*119-21.

101. Mere passive failure to disclose a known felony is insufficient to make one an accessory after the fact. *Levering v. Commonwealth*, 132 Ky. 666, 117 S. W. 253 (1909); see *Fields v. State*, 213 Ark. 899, 901, 214 S. W. 2d 230, 231 (1948). Some statutes provide a penalty for one who "conceals" a known felony. "But we are of opinion that the word 'conceal,' as here used in our statute, implies some act or refusal to act by which it is intended to prevent or hinder the discovery of the crime; that a mere failure to give information is not enough." *Davis v. State*, 96 Ark. 7, 13, 130 S. W. 547, 549 (1910). See also *United States v. Shapiro*, 113 F. 2d 891 (2d Cir. 1940). Misprision of treason is still in the Code. § 11006.

102. "It is the duty of every citizen to furnish, when called upon, evidence relative to a default of any other citizen in his civic responsibilities and his evasion or violation of the law." *United States v. First National Bk. of Mobile*, 67 F. Supp. 616, 625 (S. D. Ala. 1946). "It is the duty of every citizen, when called upon, to give all information in his possession to the proper officers of the law as to persons connected with crimes." *Miller v. Fano*, 134 Cal. 103, 106-7, 66 Pac. 183, 184 (1901).

103. In Tennessee § 9777 provides that in civil actions the husband or the wife may be competent witnesses, "though neither husband nor wife shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relation." A Federal case construing this section said, in regard to confidential communications between husband and wife where fraud possibly existed, "the public policy which regards and protects as confidential the private communications, or the acts which are their equivalent, between husband and wife, does not, under the law of Tennessee, necessarily

thermore, an innocent person should welcome an opportunity to dispel any cloud of suspicion that may have tended to cast its shadow upon him, both for his own protection and to aid in the enforcement of the law by enabling the officers to direct their efforts promptly along other lines.

"The duty of every good citizen is, when called upon, to give all information in his power to the proper officers of the law as to persons connected with crime . . . ; and this should be held to require that all proper information be given upon request of a personal nature, as affecting the one of whom the inquiry is made, when the circumstances are such as to warrant an officer in making inquiry."<sup>104</sup>

Because of this right of the officer to question and this duty of the citizen to cooperate, those found at the scene of a recent felony may properly be required to remain there for a reasonable time to enable the officers to obtain their names and addresses and to get such other information as it is possible to obtain with reasonable promptness. Attempted flight by one directed to remain there temporarily might give officers sufficient ground for believing him guilty to authorize them to arrest him without a warrant on a charge of the crime being investigated.

"It has always been the custom for cordons to be thrown out in the vicinity of a crime, or where an offender is supposed to be in hiding, and to stop all persons for purpose of identification, in order that felons may be apprehended. This is a necessary and reasonable restraint for protection of our personal liberty."<sup>105</sup> For example, about midnight on November 12, 1948, four convicts, serving terms from 25 years to life, escaped from the state prison in Nashville. A police cordon was promptly established including a road block at the Woodland Street bridge. Within the hour all four were captured by the police as they attempted to cross this bridge in a stolen car. The public interest in having the convicts promptly returned to prison far

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extend to those communications and acts which are in furtherance of a fraud, . . ." *Fraser v. United States*, 145 F. 2d 139, 144 (6th Cir. 1944). A recent Tennessee case refused to recognize an exception to the prohibition contained in this section even "in a suit brought directly by one spouse against another where there has been timely objection and exception preserved to such testimony." *Jackson v. Jackson*, 210 S. W. 2d 332, 334 (Tenn. 1948), 2 VAND. L. REV. 130. This rule, that privileged communications between husband and wife are not admissible if objection is raised, applies equally to criminal cases even though § 9778 provides: "In all criminal cases, the husband or the wife shall be a competent witness to testify for or against each other." *McCormick v. State*, 135 Tenn. 218, 186 S. W. 95 (1916).

104. *Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43, 44-45 (1908).

105. *State v. Hatfield*, 112 W. Va. 424, 164 S. E. 518, 519 (1932). A sharp distinction must be drawn between a cordon set up by the police in an emergency caused by the commission of a felony or the escape of a prisoner, and one established just to see what can be found. The former type of blockade is of rare occurrence, of short duration and under circumstances involving unusual public interest, and hence is not unreasonable. A cordon not based upon an emergency might be set up anywhere, at any time and for any period, if it was permitted. That would be quite unreasonable, and hence a police blockade, not based upon an emergency but just to search all passing that way, in the hope of securing evidence of various unknown crimes, is unlawful. *Wirin v. Horall*, 85 Cal. App. 2d 497, 193 P. 2d 470 (1948).

outweighs the individual inconvenience of those momentarily stopped by this cordon for the purpose of identification. It may be added that any of the persons so stopped could have been required, if such assistance had been necessary, to render active aid to the officers in apprehending the convicts.<sup>106</sup> And even this much longer and more arduous detention would have been neither unlawful nor an "arrest."

Detention for questioning is merely a specific instance of momentary detention incidental to the exercise of a privilege, and has received separate attention merely for emphasis. A carefully prepared model statute on arrest, it may be added, has included an express statement to the effect that authorized detention for questioning is not an arrest.<sup>107</sup>

"Detention is, of course, something closely akin to what is ordinarily considered an arrest. But not calling it such, even when it includes taking the suspect to the police station for further inquiry, may prevent his humiliation. He will not have his name entered on the police blotter. If he is ever asked, when on the witness stand, seeking employment, or running for office, whether he has ever been arrested, he will still be able to give a negative answer."<sup>108</sup>

*Subpoena.* Failure to obey the command of a subpoena may be followed by arrest<sup>109</sup> but the service of a subpoena is not an arrest.<sup>110</sup> The original method of serving a subpoena was by reading it to the person commanded to

106. Although §§ 699 and 11534 would not apply to these facts (the officers were not sheriffs or their deputies and there was no warrant) an officer has common law authority to call upon private persons to aid him in making an arrest when such aid is needed. 1 BL. COMM. \*343.

107. "Section 2. *Questioning and Detaining Suspects.* (1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going. (2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated. (3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime." Quoted in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 344 (1942).

108. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 322 (1942). A New Jersey statute made it a misdemeanor for a motorist to operate a motor vehicle without securing and carrying a driver's license, exempting for 90 days a nonresident who had complied with the laws of his own state. A nonresident driving through New Jersey was stopped and taken by a police officer to a station house and detained without a warrant while the officer investigated the motorist's explanation that no such license was required by the state of his residence. The motorist was released as soon as his statement was verified, but as it had taken from 40 minutes to two hours (the evidence was conflicting on this point) to secure the verification, he sued the officer for false imprisonment. The statute also provided that an officer could arrest without a warrant for a violation in his presence and detain the offender until taken before a magistrate for the issuance of a warrant. It was held that the proper administration of the statute required that a reasonable time be allowed to determine the driver's status in his own state. *Pine v. Okzewski*, 112 N. J. L. 429, 170 Atl. 825 (1934).

109. § 10119.

110. *People ex rel. Hastings v. Hofstadter*, 258 N. Y. 425, 180 N. E. 106. (1932).

appear,<sup>111</sup> but the temporary detention needed for this reading was purely incidental and not for the purpose of custody.

*Summons.* The primitive method of bringing a defendant into court is by force, but as civilization advances there is an increasing tendency to procure his presence by persuasion whenever such procedure seems reasonably adequate for the purpose. Although almost forgotten now, arrest was anciently the normal procedure for procuring the presence of the defendant in a civil action.<sup>112</sup> Such procedure was greatly restricted in Tennessee as early as 1831<sup>113</sup> and seems to have disappeared entirely by 1858.<sup>114</sup> It is almost as absurd to rely upon arrest as the normal procedure in cases of minor infractions of the law as it would be to do so in civil proceedings.

"It is provided by statute in England that upon complaint made of the commission of any offense the justice may, if he thinks fit, issue a summons instead of a warrant of arrest; and upon the failure of the person summoned to appear the justice may issue a warrant of arrest. 11 & 12 Vict., ch. 42, sec. 1. The summons is frequently used in England, even in felony cases if the magistrate is satisfied the person summoned will appear."<sup>115</sup>

The use of a summons in felony cases seems not to be authorized in any of the states of this country, but a number of jurisdictions permit this type of procedure in the misdemeanor field.<sup>116</sup> The American Law Institute has recommended that whenever a complaint is filed, charging a misdemeanor, the magistrate be empowered to issue a summons instead of a warrant if he has reasonable ground to believe the accused will appear upon such a demand. The warrant of arrest would issue under the recommended statute if the accused should fail to appear.<sup>117</sup> Such a change would make a distinct im-

111. *Egan v. Finney*, 42 Ore. 599, 72 Pac. 133 (1903); "The return is liable to another objection, viz: it does not show that the subpoena was 'served by being read to the witness,'" *Tooney v. State*, 5 Tex. App. 163, 187 (1878).

112. One author has insisted that a "discriminating and scholarly use of these terms" limits the words "arrest" and "arrested" to civil cases and employs "apprehend" and "apprehension" in criminal proceedings. 1 WHARTON, CRIMINAL PROCEDURE § 1 (10th ed., Kerr, 1918).

113. Tenn. Acts 1831, c. 40.

114. Code of Tennessee (1858) made no provision for civil arrest.

115. A. L. I. CODE OF CRIMINAL PROCEDURE 217 (Official Draft with Commentaries, 1931).

116. Usually it is limited to certain misdemeanors (determined by type or penalty), to violations of municipal ordinances, to offenses by juveniles, or to some combination of these. *Ibid.*

117. The American Law Institute *Code of Criminal Procedure* includes the following section:

"Section 12. *When summons shall be issued.* (1) Where the complaint is for the commission of an offense which the magistrate is empowered to try summarily he shall issue a summons instead of a warrant of arrest, unless he has reasonable ground to believe that the person against whom the complaint was made will not appear upon a summons, in which case he shall issue a warrant of arrest.

"(2) Where the complaint is for a misdemeanor, which the magistrate is not empowered to try summarily, he shall issue a summons instead of a warrant of arrest, if he has reasonable ground to believe that the person against whom the complaint was made will appear upon a summons.

"(3) The summons shall set forth substantially the nature of the offense, and shall

provement in this department of criminal procedure.

The service of a summons, like the service of a subpoena, is not an arrest.<sup>118</sup>

"Ticket." Closely resembling the service of a summons, and often confused therewith,<sup>119</sup> is the traffic "ticket" frequently handed to a motorist by an officer at the time and place of a traffic violation. While this procedure now is authorized in many places by state law<sup>120</sup> or municipal ordinance<sup>121</sup> it seems to have had its origin and early development as a result of police practice in certain communities with no legislative foundation whatever.<sup>122</sup>

The traffic "ticket" is not a true summons because it is not a writ issued by a court or magistrate. It is usually either a "notice" issued by the officer to the motorist, that he will be arrested if he does not appear, or it is an agreement signed by the motorist, that he will appear.<sup>123</sup> Some statutes or ordinances have provided for the release of a traffic violator, *after* arrest, by this device, but a much better provision authorizes the officer who has stopped such a motorist to release him *without* arrest if he will *agree* to ap-

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command the person against whom the complaint was made to appear before the magistrate issuing the summons at a time and place stated therein.

"Section 13. *How summons served.* The summons may be served in the same manner as the summons in a civil action.

"Section 14. *Effect of not answering summons.* If the person summoned fails, without good cause, to appear as commanded by the summons, he shall be considered in contempt of court, and may be punished by a fine of not more than twenty dollars. Upon such failure to appear the magistrate shall issue a warrant of arrest. If after issuing a summons the magistrate becomes satisfied that the person summoned will not appear as commanded by the summons he may at once issue a warrant of arrest."

The Federal Rules of Criminal Procedure permit the use of a summons instead of a warrant upon request of the attorney for the government. Rule 4.

118. *Long v. Ansell*, 63 App. D. C. 68, 69 F. 2d 386 (1934). "Arrest signifies a restraint of the person, a restriction of the right of locomotion, which cannot be implied in the mere notification, or summons on petition, or any other service of such process, by which no bail is required, no restraint of personal liberty." *Hart v. Flynn's Executor*, 8 Dana 190, 191 (Ky. 1839).

119. The Iowa statute speaks of it as a "summons." IOWA CODE § 321.485 (1946).

120. *Ibid.*

121. CITY OF NASHVILLE CODE, c. 35, § 113(e) (1947). This section assumes the power of an officer to issue a notice to appear for a traffic violation and provides that if he fails to appear the Traffic Violations Bureau shall mail a notice to the violator (or registered owner of a vehicle to which a notice has been attached). If this notice also is ignored a warrant for his arrest shall be issued.

122. "The summons was what is generally known as a 'ticket' and there is no statutory authority therefor. The form appears to be based substantially on Section 150 of the Code of Criminal Procedure [New York] but that section is no authority for its issuance because the summons contemplated by that section is one issued by a magistrate after the laying of an information and the taking of depositions. Code Crim. Proc. §§ 148 to 150. No penalty would have attached to the failure of plaintiff to obey the summons here. Such summons is an invitation to a defendant to come into court so that he may not be subjected to the embarrassment of arrest. If he failed to appear on the return day a warrant could be issued based on an information and depositions in connection with the offense committed. Such information and warrant would constitute an original proceeding, however, and the failure of the defendant to appear in answer to the previously issued 'ticket' would have no connection therewith except in so far as it would indicate to the magistrate issuing the warrant that a state of facts existed where a warrant was necessary or a proper legal summons under Section 150 aforesaid might issue." *Mormon v. Baran*, 35 N. Y. S. 2d 906, 909 (Sup. Ct. 1942).

123. IOWA CODE § 321.485 (1946).

pear voluntarily.<sup>124</sup> The average traffic violator is not a "criminal" in any sense of the word, and anything which seems to place him in that category not only does him an injustice but is likely to confuse the attitude of the public toward those who commit true crimes.

The use of the traffic "ticket" saves so much time for the officer himself that the employment of some similar device might well be authorized for other cases of minor infractions where the offender is known or can be easily identified and the circumstances are sufficient to justify the conclusion that no more drastic step is needed.

### III. AUTHORITY TO ARREST

The Constitution of Tennessee provides:

"That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty, and ought not to be granted."<sup>125</sup>

This section imposes limitations upon (1) arrest (seizure of the person) and (2) search for, and seizure of, property. Only the first of these demands attention at this point. It does not forbid arrest without a warrant. Such a limitation would have been stated very directly if intended. Insofar as an arrest may be made properly without a warrant it is not unreasonable and hence not forbidden. Beyond this area an arrest without a warrant is unlawful.

#### A. Under a Warrant

In any such case a warrant is needed and definite limitations are prescribed. It must not be a general warrant which fails (1) to name the person

124. *Ibid.* An officer's statement to a person violating a traffic ordinance in the officer's presence that he should appear in the city court on the following morning is not an arrest. *People v. Yerman*, 138 Misc. 272, 246 N. Y. Supp. 665 (Co. Ct. 1930).

"Compliance with a demand which the actor makes upon another under threat that, unless the other complies therewith, the actor will take him into custody under a warrant or other asserted authority is not submission thereto." *RESTATEMENT, TORTS* § 41, comment *e* (1934).

125. *TENN. CONST.* Art. I, § 7. This, and the other declarations in Art. I are further fortified in Art. XI, § 16, as follows: "The declaration of rights, hereto prefixed, is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the Bill of Rights contained is excepted out of the general powers of the government, and shall forever remain inviolate." The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons to be seized."

to be arrested or (2) particularly to describe the offense charged; and (3) it must not be a warrant (however particular it may be) unsupported by evidence.

### 1. The Warrant of Arrest

In studying the law dealing with arrests made in obedience to a warrant it is necessary to consider (1) the warrant itself and (2) the execution of the warrant. And the warrant may be studied to best advantage by focusing attention separately upon (a) the issuance, (b) the requisites of a valid warrant, (c) the process which meets the requirements of a warrant "fair on its face," (d) general warrants, and (e) the life of a warrant.

#### a. *Issuance of the Warrant*

The requirement that the warrant must be "supported by evidence" is entitled to early attention although it appears near the end of the clause itself. The purpose back of this requirement is no doubt the same as that expressed in the Fourth Amendment to the Constitution of the United States in these words: "No warrants shall issue, but upon probable cause, supported by oath or affirmation." Neither clause stipulates what shall be regarded as proof for this purpose. There seems to be no foundation for the assumption that nothing can be regarded by the magistrate as "evidence" at this stage of the proceeding unless it would be admissible to establish guilt at the trial itself,<sup>126</sup> and the most careful analysis indicates the contrary conclusion.<sup>127</sup>

Statutes enacted to implement the constitutional provision, after defining the "information" which charges a person with a designated offense<sup>128</sup> and authorizing magistrates to issue warrants of arrest,<sup>129</sup> prescribe as follows:

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126. It is commonly stated that the general rule does not permit an application for the issuance of a warrant not supported by positive personal knowledge. Notes, 18 Ann. Cas. 817 (1911), 10 L. R. A. (N.S.) 159 (1907), 25 L. R. A. (N.S.) 60 (1910).

127. Pollak, *Issuance of Warrants of Arrest under Criminal Informations*, 6 FED. B. J. 291 (1945). Mr. Pollak says: "In view of the complexities of our social organization and the involved nature of the manifold activities which today are considered criminal, it is not surprising that comparatively few applications for warrants of arrest or for search warrants are supported by positive personal knowledge on the part of an affiant that a defendant has committed the offense charged against him." *Id.* at 298. "Probable cause has been defined by this Court as 'reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.'" *Dumbra v. United States*, 268 U. S. 435, 441, 45 Sup. Ct. 546, 69 L. Ed. 1032 (1925); *Worthington v. United States*, 166 F. 2d 557, 563 (6th Cir. 1948). The definition itself was repeated in *People v. Karcher*, 33 N. W. 2d 744, 746 (Mich. 1948).

128. § 11512. "Information. The information is the allegation made to a magistrate that a person has been guilty of some designated public offense."

129. § 11517. "Warrant of arrest. For the apprehension of persons charged with public offenses, magistrates are authorized within their jurisdiction, to issue warrants of arrest, under the rules and regulations in this chapter prescribed."

"Warrants of arrest may be issued not only by justices of the peace, but by the judges of the circuit and criminal courts, police, and other special justices appointed or elected in a city, village or town, and by the mayors and recorders of cities and towns upon whom criminal jurisdiction is conferred by law." *McCaslin v. McCord*, 116 Tenn. 690, 704, 94 S. W. 79, 82 (1906). § 11514 declares such officers to be magistrates within



"Upon information made to any magistrate of the commission of a public offense, he shall examine, on oath, the informant, reduce the examination to writing, and cause the examination to be signed by the person making it." <sup>130</sup>

"The written examination shall set forth the facts stated by the informant tending to establish the commission of the offense and the guilt of the defendant." <sup>131</sup>

"If the magistrate is satisfied therefrom that the offense complained of has been committed, and there is reasonable ground to believe the defendant is guilty thereof, he shall issue a warrant of arrest." <sup>132</sup>

*Probable cause.* Enforcement of the law would be hopelessly handicapped if no arrest could be made until after evidence sufficient to convict the arrestee had been secured. Hence the requirement at this point of procedure is not "evidence beyond a reasonable doubt" but merely "probable cause" for believing its existence.<sup>133</sup>

*Information and belief.* This permits the issuance of a warrant on an affidavit filed by one not having personal knowledge of the crime if the nature and source of his information are disclosed and are sufficient to satisfy the requirement of probable cause.<sup>134</sup> As stated in a federal case: "If

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the meaning of the chapter, adding also "judges of the supreme court." And, by express provision, a coroner is authorized to issue a warrant for the arrest of one accused of unlawful homicide by a coroner's jury. §§ 11890, 11891. This warrant is of "equal authority with that of a justice of the peace." §11892.

130. § 11518.

131. § 11519.

132. § 11520. If a defendant defaults, after having been released on bond, the magistrate "may issue another warrant of arrest, upon which the same proceedings may be had against the defendant as on an original warrant." § 11553. See also § 11430.

Under special circumstances other types of process may be issued for the arrest of a person which are not "warrants" in the narrowest sense of the term and do not come within the requirements of the constitutional and statutory provisions quoted in the text. If a judge, for example, having knowledge of the facts, desired the apprehension of a witness who had disobeyed a subpoena, or a person who had committed some other contempt of court, it would be absurd to require him to go before some other magistrate and make an affidavit for this purpose, and this has never been necessary. These special types of process are issued directly by the judge, or by his order,—or in certain instances by some other authority. Thus § 10119 provides for the issuance of "attachments" for the arrest of one who has disobeyed a subpoena or committed some other contempt of court.

After a prisoner has given bail the court may order him to be arrested again if the security is deemed insufficient or is forfeited by his failure to appear. § 11711. And he may be rearrested pursuant to this order on a certified copy thereof, or upon a *capias* issued thereon. § 11713. After an indictment is found, the clerk of the court issues a *capias* for the arrest of the defendant if he is not in custody or on bail. § 11609. Furthermore, either house of the general assembly, or a committee thereof "shall have the right and power to issue and enforce process of arrest. . . ." § 172.4. An arrest under any such attachment, *certified copy* of the court's order, *capias*, or *process of arrest* is an "arrest under a warrant." For the peculiar shift in the meaning of the word "warrant" see *infra*, Section III, D, "Authority to Arrest—Without a Warrant."

133. *State v. Davie*, 62 Wis. 305, 22 N. W. 411 (1885). "In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; . . ." *Dumbra v. United States*, 268 U. S. 435, 441, 45 Sup. Ct. 546, 69 L. Ed. 1032 (1925).

134. *Ex parte Blake*, 155 Cal. 586, 102 Pac. 269 (1909); *State v. Kees*, 92 W. Va.

the complaint is made on information and belief, it must give the grounds of belief and sources of information. A complaint not based upon complainant's personal knowledge, and unsupported by other proof, confers no jurisdiction upon the commissioner to issue a warrant."<sup>135</sup>

*The affidavit.* Where the affidavit is made by one not having personal knowledge of the crime it is proper for him to disclose the name of his informant to the magistrate,<sup>136</sup> since the latter "is required to exercise a judicial discretion, determinative of the sufficiency of the evidence, before he grants the writ."<sup>137</sup> On the other hand, it "is for the magistrate himself to determine, whether, in any case before him, it is essential that the name of an

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277, 114 S. E. 617 (1922); *State v. Davie*, 62 Wis. 305, 22 N. W. 411 (1885). *Contra*: *Swart v. Kimball*, 43 Mich. 451, 5 N. W. 635 (1880). A complaint is bad if affiant swears that he "has good reason to believe" but there is no allegation that he "does believe." *Greeson v. State*, 141 Tex. Cr. 115, 147 S. W. 2d 804 (1941); *cf. Sims v. State*, 137 Ala. 79, 34 So. 400 (1903). See Note, *Complaint or Information Based on Information and Belief as the Basis for the Issuance of a Warrant, or for Examination Preliminary Thereto*, 10 L. R. A. (n.s.) 159 (1907).

"Therefore I think, that if A makes oath before a justice of peace of a felony committed in fact, and that he suspects B and shews probable cause of suspicion, the justice may grant his warrant to apprehend B and to bring him before him, or some other justice of peace to be examined, . . ." 1 HALE P. C. \*579-80. *Accord*, 4 BL. COMM. \*290.

See *Elliott v. State*, 148 Tenn. 414, 256 S. W. 431 (1923). This is a search warrant case. In fact all of the Tennessee cases cited under "information and belief" and "affidavit" are search warrant cases unless otherwise indicated. These problems are the same whether the warrant is for search or arrest since both stem from the constitutional requirement (Art. I, § 7) that such warrants must be supported by "evidence." The point is much more likely to be raised in the search warrant cases because success in the claim of invalidity of the warrant may result in the exclusion of damaging evidence. *Craven v. State*, 148 Tenn. 517, 256 S. W. 431 (1923). On the other hand, proof that a warrant of arrest was improperly issued would not entitle the arrestee to a release from custody if there were sufficient grounds to hold him at the time of the hearing on this point. *Ex parte Crandall*, 2 Cal. 144 (1852); *cf. State ex rel. Estill v. Endsley*, 122 Tenn. 647, 126 S. W. 103 (1909). The more likely consequence in the arrest case would be one of no particular interest to the arrestee, such as inability of the justice to have his costs taxed against the county. *State v. Good*, 77 Tenn. 240 (1882).

135. *Worthington v. United States*, 166 F. 2d 557, 563 (6th Cir. 1948). "Suspicion is not enough, and information and belief are not enough, unless facts are stated showing the source of the information and the grounds of belief." *People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 392, 79 N. E. 330, 333 (1906). A warrant of arrest issued upon the affidavit of one who informs the justice that he does not know the facts of his own knowledge, and adds merely that he has been told by a third party that the offense has been committed, is issued without sufficient legal grounds. *State v. Good*, 77 Tenn. 240 (1882). In this case affiant did not disclose any of the facts of the offense but merely the conclusion that it had been committed. There is no indication that his informant had told affiant any of the details. An affidavit for a search warrant may be based upon information and belief, but it must state the nature of the information which has been given affiant in order that the magistrate may determine whether such information constitutes probable cause.

"To illustrate, the affidavit must state that affiant has been informed by the person giving him the information that he has been to the premises of the defendant and seen intoxicating liquors on his person, or on the premises described; that he has seen jugs, bottles, or other receptacles on the premises that bore the odor of intoxicating liquors; that he has seen persons coming from the premises in an intoxicated condition; that he has seen persons carrying intoxicating liquors away from the premises; . . . and such other facts as tend to show that the defendant has in his possession at said premises intoxicating liquors." *Jackson v. State*, 153 Tenn. 431, 438-39, 284 S. W. 356, 358 (1926).

136. See *Jackson v. State*, 153 Tenn. 431, 438, 284 S. W. 356, 358 (1926); *Waggenger v. McCanless*, 183 Tenn. 258, 260-61, 191 S. W. 2d 551, 552 (1946).

137. *Hampton v. State*, 148 Tenn. 155, 161, 252 S. W. 1007, 1008 (1923).

informant, otherwise shown to him to be a reliable person, shall be given."<sup>138</sup> Even if the magistrate is given the name of affiant's informant it is not necessary for this name to be included in the affidavit.<sup>139</sup> This is a matter within the magistrate's discretion.<sup>140</sup> As explained by the court: "The statement of the affidavit that the informant was a reliable person and claimed to have heard the plaintiff in error agree to deliver whiskey on the night the search warrant was to be executed, justified the magistrate in determining that probable cause existed for the issuance of the warrant; . . ." <sup>141</sup>

On the other hand, it should be added, an affidavit based upon personal knowledge will be insufficient for the issuance of a warrant if it fails to set forth the facts.<sup>142</sup>

Even if written on the same piece of paper the affidavit is not a part of the warrant and may not be looked to for the purpose of supplying anything needed there unless it was expressly adopted.<sup>143</sup> But when the affidavit is made a part of the warrant by reference its wording will be considered in this regard.<sup>144</sup>

*Time.* By express provision of the statute a warrant may be issued at any time.<sup>145</sup>

*Jurisdiction.* A warrant may be issued in any county in which the accused may be found although the crime was committed in another part of the state.<sup>146</sup>

138. *Gallimore v. State*, 173 Tenn. 178, 181, 116 S. W. 2d 1001, 1002 (1938).

139. See *Jackson v. State*, 153 Tenn. 431, 438, 284 S. W. 356, 358 (1926); cf. *Zimmerman v. State*, 173 Tenn. 673, 122 S. W. 2d 436 (1938). The following was held sufficient in a search warrant case: "This affidavit is based on information just received from a good and reliable person whose name affiant has disclosed to me as a Justice of the Peace. Affiant states on oath that said informant has just told him that he had *just recently seen* the above named persons place a quantity of intoxicating liquors on the premises hereinafter described; also, that he has *recently* seen sundry persons drinking intoxicating liquors on said premises and going there at different hours of the day and night sober and returning in a drunken condition. (In the margin) Affiant's informant says said sales have been made to him *frequently and within the last few days.*" *Waggener v. McCanless*, 183 Tenn. 258, 260-61, 191 S. W. 2d 551, 552 (1946).

140. *Gallimore v. State*, 173 Tenn. 178, 116 S. W. 2d 1001 (1938).

141. *Stroud v. State*, 159 Tenn. 263, 267-68, 17 S. W. 2d 899, 900 (1929).

142. *Jackson v. State*, 153 Tenn. 431, 284 S. W. 356 (1926). An affidavit made by a police officer and based on information of a "reliable citizen" wherein the only fact according to the affidavit, which informant disclosed was that he saw "a quantity of intoxicating liquor" on defendant's premises, was insufficient under part (3) of § 11898, to justify the issuance of a warrant, since possession of intoxicating liquor might be lawful. *King v. State*, 174 S. W. 2d 463, 464 (Tenn. 1943).

143. *Minton v. State*, 212 S. W. 2d 373 (Tenn. 1948); *Ellison v. State*, 212 S. W. 2d 387 (Tenn. 1948); *Jackson v. State*, 153 Tenn. 431, 284 S. W. 356 (1926); *Hampton v. State*, 148 Tenn. 155, 252 S. W. 1007 (1923).

144. *Ellison v. State*, 212 S. W. 2d 387 (Tenn. 1948); see *Minton v. State*, 212 S. W. 2d 373, 374 (Tenn. 1948).

145. § 11530. "Issuance and return. Any process, warrant, or precept, authorized to be issued by any of the judges, justices of the peace, or clerks of court, in any criminal prosecution on behalf of the state, may be issued at any time and made returnable at any day of the term." This authorizes issuance on Sunday. *Seals v. State*, 157 Tenn. 538, 11 S. W. 2d 879 (1928).

146. *Johnston v. State*, 10 Tenn. 58 (1821). And see *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906).

*Direction.* At common law a warrant of arrest was directed either to a peace officer or to a private person; if to an officer he was bound to execute it, whereas if to a private person he was not bound to execute it, but if he did so it was as good as if by an officer.<sup>147</sup> Furthermore, it might be directed to a particular officer by name, or by the designation of his office, or it might be directed generally to officers as a class.<sup>148</sup> The approved form under the code is "to any lawful officer of the state,"<sup>149</sup> but by express provision this is the direction in legal effect even if not so worded,<sup>150</sup> except that a warrant issued by a judge of the supreme, circuit, or criminal court may have a special direction to "any suitable person, by name."<sup>151</sup>

*Place of issuance.* The warrant may be issued in the county in which the offense was committed, although the accused is known to be now in some other part of the state;<sup>152</sup> or it may be issued in any county wherein the accused is found although the crime was perpetrated elsewhere.<sup>153</sup>

b. *Requisites of a Valid Warrant*

The validity of a warrant of arrest is not dependent upon the fact of crime having been committed or the guilt of the person accused.<sup>154</sup> It is dependent entirely upon three other factors which are: (1) compliance with all of the legal requirements for the issuance of a warrant of arrest, (2) jurisdiction of the magistrate or other issuing authority, and (3) regularity in the form of the warrant.<sup>155</sup> The requirements for issuance have already received consideration.

*Jurisdiction of issuing authority.* The matter of jurisdiction involves three points: (a) It must be issued by a magistrate, judge or other official or body having authority to issue warrants of arrest, and the issuer must have

147. 2 HALE P. C. \*110.

148. 2 HAWK. P. C., c. 13, §§ 27-30 (6th ed., Leach, 1788).

149. §§ 11522, 11533.

150. § 11522. "*Direction.*—The warrant should be directed to any lawful officer of the state, but if executed by any officer having authority, it is valid without regard to its direction." A *capias*, following an indictment, may be directed "to all sheriffs in the state, and any sheriff or deputy may execute it in any county in the state." § 11611.

151. § 11529. "*Issued by a judge.* When issued by a judge of the supreme, circuit, or criminal court, it may be executed in any county in the state; and such judge may empower, by special direction embodied in the warrant, any suitable person, by name, to execute such warrant anywhere in the state."

152. "When the person accused has fled, or resides out of the county where the offense was committed, the warrant may issue to any lawful officer of any county in the state, and the accused may be brought before the magistrate issuing the warrant, or any other magistrate." § 11527. Compare § 11522: "The warrant should be directed to any lawful officer of the state. . . ."

153. *Johnston v. State*, 10 Tenn. 58 (1821). And see *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906).

154. "A warrant is valid even though the court, through lack of information or otherwise, has issued it for the arrest of a person in fact innocent of the offense alleged. The guilt or innocence of the accused is not a matter which concerns the officer. It is his duty to serve the warrant and he is privileged to do so, even though he has reason to believe or even knows that the person for whose arrest the warrant is issued is in fact innocent of the offense with which he is charged therein." RESTATEMENT, TORTS § 123, comment a (1934).

155. *Id.* § 123.

not merely some authority in this field, but authority to issue a warrant (b) for the conduct for which this particular writ is issued,<sup>156</sup> (c) under the circumstances of this issuance, and (d) for the arrest of the person whose custody is required.<sup>157</sup> A coroner or a clerk of court, for example, has a very limited authority to issue warrants. A coroner is expressly authorized to issue a warrant for the arrest of a person implicated in an unlawful homicide by the findings of a jury at a coroner's inquest,<sup>158</sup> but is not given the general powers of a magistrate.<sup>159</sup> And a clerk of court is empowered to issue a *capias* (which is a warrant within the meaning of an "arrest under a warrant"), without special court order, for the arrest of a defendant against whom an indictment has been found if the defendant is not in actual custody, at the time, or at liberty under outstanding bail,<sup>160</sup> but has no authority to issue a *capias*, without court order, for the arrest of a defendant who is out on bail that has not been forfeited.<sup>161</sup>

Thus a warrant of arrest issued by a coroner charging the crime of embezzlement would be invalid.<sup>162</sup> His warrant charging murder would be valid if issued for the arrest of one implicated by the coroner's jury but not if issued on an ordinary information and without inquest. And a *capias* issued by the clerk of the court for any indictable offense is valid if issued for the arrest of a defendant who is at liberty without bail at the time of the indictment; but is invalid if issued, *without court order*, for the arrest of one at liberty under bail which has not been forfeited.<sup>163</sup>

156. A magistrate is authorized to issue a warrant for any public offense. § 11513. The offense may be alleged by naming or describing it. See the form suggested in § 11523. "It is not necessary that the offence or conduct be described with particularity as to place or time, and it is sufficient if the general nature of the act charged be stated." RESTATEMENT, TORTS § 123, comment b, 2 (1934).

157. *Ibid.* The *Restatement* does not mention the requirement of authority to issue under the circumstances of issuance but there can be no doubt of this. See the discussion of issuance by the coroner or the clerk of court in the text, *infra*.

158. §§ 11890, 11891, 11892.

159. § 11514 setting forth who are magistrates does not include the coroner.

160. § 11609. "A *capias* for each defendant against whom an indictment has been found, who is not in actual custody, or who has not been bailed, or whose undertaking of bail has been declared forfeited, shall be issued by the clerk as soon after the indictment has been filed as may be." "The return of an indictment authorizes and supports the issuance and execution of a *capias* for the arrest. . . ." *Shaw v. State*, 164 Tenn. 192, 196, 47 S. W. 2d 92, 93 (1932).

161. *Russell v. State*, 134 Tenn. 640, 185 S. W. 693 (1915). "As many writs of *capias* may be issued as are necessary, and after any forfeiture is taken, another *capias* may issue without an order." § 11620.

162. Compare: "Thus, a United States Commissioner has authority to issue a warrant upon a complaint charging a violation of a federal statute. If, however, by inadvertence the warrant should recite that it is issued for the violation of a State statute, even though the conduct is an offense under both State and federal statute, the warrant is not valid; nor indeed would it be fair upon its face, since this recital discloses an obvious lack of authority." RESTATEMENT, TORTS § 123, comment c (1934).

163. *Russell v. State*, 134 Tenn. 640, 185 S. W. 693 (1915); *Poteete v. State*, 68 Tenn. 261 (1878). Either house of the general assembly, or a committee thereof, has power to issue "process of arrest or attachment" (a warrant) for disobedience and contempt by persons subpoenaed as witnesses by it. § 172.4. This does not authorize issuance of a warrant charging a crime not involving such contempt. As to the recorder's jurisdiction see §§ 3561, 3564.

Jurisdiction over the person named in the warrant is a matter free from difficulty unless the accused is the chief executive of the state or nation,<sup>164</sup> or is a foreign sovereign or a diplomatic representative (or a member of his household or official staff) and hence is protected by immunity from arrest.<sup>165</sup>

*Regularity of form.* "A warrant of arrest is an order, in writing, stating the substance of the complaint, directed to a proper officer, signed by a magistrate, and commanding the arrest of the defendant."<sup>166</sup> It should be directed "to any lawful officer of the state," but this is not a requisite because the statute adds this direction whether included in express words or not.<sup>167</sup> The requisites<sup>168</sup> as to the form of the warrant are that it must:

- (a) be in writing,<sup>169</sup>
- (b) "run in the name of the State of Tennessee,"<sup>170</sup>
- (c) disclose that it is based upon information on oath,<sup>171</sup>
- (d) give the name of the accused if known,<sup>172</sup>
- (e) name or describe the offense charged,<sup>173</sup>

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164. See *State ex rel. Latture v. Board of Inspectors*, 114 Tenn. 516, 519, 86 S. W. 319 (1904). As to the privilege of the governor or president from arrest see *infra* Section VII, B, "Diplomatic Immunity."

165. RESTATEMENT, TORTS § 123, comment *d* (1934). And see *infra* Section VII, "Immunity from Arrest."

166. § 11521.

167. § 11522.

168. § 11521.

169. The requisites of a valid form stated in the text, as well as the statutory form quoted, refer to the "warrant" in its narrowest sense,—a writ issued for the arrest of a person accused by "information" made to a magistrate. Other writs which are "warrants" in the broader sense will differ somewhat in form because of the difference in the circumstances. For example if the court orders defendant rearrested after he has been released on bail (§ 11711), the "order for the arrest and recommitment shall recite generally the facts upon which it is founded, and direct the defendant to be arrested and committed to the custody of the sheriff of the county where the court then having cognizance of the offense is held, to be detained until legally discharged." § 11712. The "warrant" under which the defendant may be arrested under this order is either "a certified copy thereof," or a "capias issued thereon." § 11713. The certified copy of the order will contain the "facts upon which it is founded." If the process is in the form of a capias it should also recite these facts, in order to be valid.

The arrest of a defendant by the sureties on his bail bond is on a certified copy of the undertaking. § 11684. This is treated as if it were a warrant for certain purposes (§§ 11686, 11687), but it is not a warrant in the sense of a writ or process.

170. TENN. CONST. Art. VI, § 12. A writ not running in the name of the state is void. *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200 (1893). Although the form suggested by the statute places "State of Tennessee" at the top of the warrant (§ 11523) the warrant is valid if the name of the state appears in the body and not in the caption. *Murfreesboro v. Bowles*, 213 S. W. 2d 35 (Tenn. 1948).

171. The Constitution of Tennessee provides, Art. VI, § 12: "All writs and other process shall . . . bear teste . . ." In another place it provides that warrants shall be "supported by evidence." Art. I, § 7. And the statute requires the magistrate to examine the informant under oath. § 11518. See also the form suggested. § 11523.

172. § 11524. "*Defendant's Name.*"—The warrant should specify the name of the defendant, but if it be unknown to the magistrate, the defendant may be designated therein by any name. It should also state the offense either by name, or so that it can be clearly inferred." And see, *infra*, under "general warrant."

173. *Ibid*; § 11523. A warrant is sufficient which charges the offense to be "hawking and peddling without a license as is required by law." *State v. Sprinkle*, 26 Tenn. 36 (1846).

(f) show the county in which it is issued,<sup>174</sup>

(g) command that the person accused be arrested and brought before the issuing magistrate or some other,<sup>175</sup>

(h) be signed by the magistrate,<sup>176</sup>

(i) and give, in addition to his name, the initials of his office.<sup>177</sup>

The statute gives a guide as to form.

"The warrant of arrest may be substantially as follows :

"State of Tennessee }  
" \_\_\_\_\_ County } To any lawful officer of the state :

"Information on oath having been made to me that the offense of [designating or describing it] has been committed, and accusing C D thereof: you are, therefore, commanded, in the name of the state, forthwith to arrest C D, and bring him before me, or some other magistrate of said county, to answer the charge. E F, Justice of the Peace for \_\_\_\_\_ County." <sup>178</sup>

c. "*Fair on Its Face*"

For obvious reasons a duly authorized officer who executes a valid warrant in a proper manner is fully protected.<sup>179</sup> His protection may go even beyond this. If the execution is in a proper manner and the warrant is "fair on its face," there has been no trespass even if the warrant falls short of actual validity.<sup>180</sup> As said by the California court: "Where a warrant valid in

174. § 11525. "*Venue and Name of Magistrate*.—The warrant should also show, in some part, the county in which issued, the name and initials of office of the magistrate."

175. §§ 11521, 11523, 11527. A writ issued for the arrest of one previously released on bail should direct that the arrestee be committed to the custody of the sheriff of the county where the court having cognizance of the offence is held, §§ 11712, 11713, unless it is for failure of defendant to appear for judgment, in which case the direction should be according to the requirements of the court's order. §§ 11714, 11862, 11863.

176. § 11521. The signing of a warrant is an official act which cannot be delegated by the magistrate to another. *Kirkwood v. Smith*, 77 Tenn. 228 (1882). This was a civil case but the rule would apply *a fortiori* to a criminal case.

177. § 11525, quoted *supra*. A warrant signed and sealed by a justice of the peace, with the initials "J.P." to designate his official character, is good. *State v. Manley*, 1 Tenn. 428 (1809). It was held in 1832 that a warrant not having the magistrate's seal was void. *Tackett v. State*, 11 Tenn. 392 (1832). But this is not one of the requirements of the Constitution. Art. VI, § 12. And it is not mentioned in the Code. §§ 11521, 11523. Moreover the general rule today does not require a seal. "Unless so provided by statute, the absence of a seal does not prevent the warrant from conferring a privilege to make arrests under it." *RESTATEMENT, TORTS* § 123, comment b, 3 (1934). In view of that early case, however, magistrates should add a seal to the warrant until the need therefor is clearly removed by statute or by decision.

178. § 11523. It would seem desirable for the warrant to be dated and such a requirement is found in the statutes of a number of the states. A. L. I. *CODE OF CRIMINAL PROCEDURE* 188 (Official Draft with Commentaries, 1931). But this is not mentioned in the Tennessee statutes and no provision for date is included in the suggested form. Compare § 11523, with the form for search warrant, § 11902, which does provide for the date to be given. There is urgent need for the date in a search warrant which does not apply to an arrest warrant. Probable cause to believe certain property to be in a designated place cannot be dissociated from the element of time, and a search warrant must be returned within five days after its date. § 11907.

179. *RESTATEMENT, TORTS* § 122 (1934).

180. *Ibid.* "If a warrant, although in fact invalid for any reason, is in regular form

form and issued by a court of competent jurisdiction is placed in the hands of an officer for execution, it is his duty without delay to carry out its commands. The law is well settled that for the proper execution of such process the officer incurs no liability, however disastrous may be the effects of its execution upon the person against whom it is issued."<sup>181</sup> The officer's duty to execute the warrant promptly<sup>182</sup> is inconsistent with any delay to enable him to investigate collateral matters such as the regularity of proceedings prior to the issuance,<sup>183</sup> and hence if there are irregularities at this point not disclosed upon the warrant itself they will not interfere with the protection accorded the officer.<sup>184</sup> If, for example, a warrant issued by a justice of the peace recites: "information on oath having been made to me, charging that the offense of murder has been committed and accusing" a certain person, by name, thereof—the officer who makes an arrest in a proper manner in reliance thereon is protected even though the justice actually issued the warrant upon an *unsworn* complaint.<sup>185</sup> To illustrate further: a person arrested and imprisoned for the violation of a void ordinance or statute may be discharged from custody on habeas corpus; but if the arrest was under a warrant that was fair on its face

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and contains every required recital of fact and if the facts stated, were they true, would authorize the court to issue it and if there is nothing stated or omitted to indicate that the proceedings necessary to its proper issuance have not been duly taken, the person designated to serve it is privileged to arrest under it even though, because of facts not stated therein, the warrant is invalid." *Id.* § 124, comment *b*.

181. *Malone v. Carey*, 17 Cal. App. 2d 505, 506-7, 62 P. 2d 166, 167 (1936).

182. "You are, therefore, commanded, . . . *forthwith* to arrest CD, . . . ." § 11523. (Italics added.)

183. "A warrant fair on its face is a warrant which, although regular in form, differs from a valid warrant in one or more of the following particulars:

"(a) the court, body or official issuing the warrant has not authority to issue the warrant for the conduct for which it is issued, but has authority to issue a warrant for the conduct therein described as that for which it is issued, or for conduct of the same general character as that so described, or

"(b) the court, body or official issuing the warrant has not jurisdiction over the person sufficiently named or otherwise described therein, but the facts stated in the warrant, without more, are such as, if they existed, would confer jurisdiction, or

"(c) one or more of the proceedings required for the proper issuance of the warrant have not duly taken place, but nothing appears in the warrant to indicate that this is so." RESTATEMENT, TORTS § 124 (1934).

184. *Spear v. State*, 120 Ala. 351, 25 So. 46 (1899); *Wilson v. Lapham*, 196 Iowa 745, 195 N. W. 235 (1923); *Donahoe v. Shed*, 49 Mass. 326 (1844). It has been held that an officer is not liable for executing a warrant fair on its face (in a lawful manner) even if he personally knows of jurisdictional defects in the preliminary proceedings pursuant to which it was issued. *People v. Warren*, 5 Hill 440 (N. Y. 1843). See also *Hoppe v. Klapperich*, 224 Minn. 224, 28 N. W. 2d 780 (1947). An officer is privileged to execute a warrant which is fair on its face although he "has reason to know, or even knows, a fact the existence of which makes it invalid." RESTATEMENT, TORTS § 124, comment *b* (1934). The reason for such a rule is that the sheriff may be mistaken in his belief of defects in preliminary proceedings and it is undesirable to have the execution postponed while he concerns himself with problems that are peculiarly within the province of the magistrate.

185. A warrant is fair on its face, if regular in form, although "one or more of the proceedings required for the proper issuance of the warrant have not duly taken place, but nothing appears in the warrant to indicate that this is so." RESTATEMENT, TORTS § 124(c) (1934). "So too, an officer is protected in serving a warrant, although he knows that it has been issued upon an unsworn complaint, if the warrant does not" disclose this defect. *Id.* at comment *b*.



the apprehending officer is not liable in damages to the arrestee.<sup>186</sup> As summarized by the American Law Institute: "For the purpose of the privilege to arrest there is, therefore, no distinction between a valid warrant and a warrant fair on its face."<sup>187</sup>

On the other hand, a warrant which discloses its invalidity on its face will give the officer no protection whatever.<sup>188</sup> The officer is bound to know the formal requirements of a valid warrant,<sup>189</sup> and whether the cause for which the arrest is demanded is such as to entitle the issuance of a warrant. If, for example, the warrant commands the arrest of a person named, for the commission of crime, but does not state that he is accused of the commission of any particular crime, an arrest in reliance upon this "warrant" will be unlawful because it is neither valid nor fair on its face.<sup>190</sup> The sound rule is that in the execution of a warrant issued by a magistrate,<sup>191</sup> "the officer is not required to know at his peril whether the conduct which a warrant describes as the conduct for which it was issued constitutes a crime."<sup>192</sup> Unfortunately, some courts have taken a contrary view.<sup>193</sup>

The officer is bound to know whether the one issuing the warrant has authority to order an arrest for the cause stated, or under the circumstances disclosed. Hence, the officer making an arrest in reliance upon a warrant is not protected if it was issued by one having no authority to issue any warrant, or by one having authority to issue warrants for other purposes, but not for the cause stated.<sup>194</sup> Obviously a sheriff should not undertake to execute a warrant charging embezzlement if it was issued by a coroner,<sup>195</sup> nor

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186. *Hofschulte v. Doe*, 78 Fed. 436 (C. C. N. D. Cal. 1897).

187. RESTATEMENT, TORTS § 124, comment *a* (1934).

188. *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200 (1893); *Tackett v. State*, 11 Tenn. 392 (1832). To be certain of escaping liability an officer "must know what proceedings are necessary for the proper issuance of the process, and is not privileged to arrest another under a warrant which discloses that any of the necessary proceedings have not taken place." RESTATEMENT, TORTS § 124, comment *b* (1934).

189. *Ibid.*

190. *Lynchard v. State*, 183 Miss. 691, 184 So. 805 (1938).

191. In Tennessee a magistrate has authority to issue a warrant for any public offense. § 11513.

192. RESTATEMENT, TORTS § 124, comment *j* (1934). The comment quoted in the text continues: "A fortiori, this is so where a warrant not only states the conduct for which it was issued but describes it as a named crime. Even though the conduct so described is not named as a crime, the officer is entitled to assume that the court knows the law and is not exceeding its authority and therefore to assume that such conduct is a crime at common law or has been made so by statute."

193. It has been held that if the warrant purports to charge the accused with a particular crime but states conduct which does not constitute any offense, the officer is not protected. *Reichman v. Harris*, 252 Fed. 371 (6th Cir. 1918). In this case (which was prior to the Fugitive Felon Act) the accused was charged with the offense of "fugitive from justice." It has been held that the officer is bound to know the elements of particular offenses. Thus a warrant of arrest for obtaining goods by false pretenses which disclosed on its face that the complainant, from whom the goods were obtained, knew of the falsity of the representations at the time they were made, was not fair on its face and gave no protection to the officer who made an arrest under it. *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101 (1894).

194. RESTATEMENT, TORTS § 124, comments *c* and *d* (1934).

195. Compare *id.* at comment *d*.

a *capias* issued by a clerk of the court for the arrest of one who had previously been released on bail unless the writ disclosed that it was issued under an order of the court,<sup>196</sup> or that the bail taken had been forfeited.<sup>197</sup>

d. *General Warrants*

A Connecticut magistrate, with more enthusiasm than discretion, issued a warrant to search every house, store or barn within the town of Wilton, suspected of having certain bags in it, said to be stolen, and to arrest all persons suspected of having stolen them. The court held that either a general search warrant or a general arrest warrant is illegal and that this was a combination of the two.<sup>198</sup> The Constitution of Tennessee expressly forbids "general warrants" in which the person to be arrested is "not named."<sup>199</sup> A magistrate should be satisfied, as a result of information on oath, that there is probable cause to believe a certain person guilty of a specified offense before a warrant of arrest is issued,<sup>200</sup> and the person arrested thereunder should be the one indicated by the sworn evidence before the magistrate and not merely someone who seems to be guilty by other evidence subsequently discovered by the apprehending officer.<sup>201</sup> An officer who has been given a warrant may discover new evidence which seems clearly to exculpate the one originally named and to point out some other as the guilty person. The officer's duty is still to execute the warrant he has,<sup>202</sup> exactly as it was issued, until and unless he receives some other command; but if the one accused therein is not present when the new evidence is discovered, the circumstances may be sufficient to justify the officer in returning to the issuing magistrate with the new information. If the magistrate takes up the old warrant and issues a new one, or amends the original, the officer may now ignore the

196. *McQueen v. Heck*, 41 Tenn. 212 (1860).

197. § 11620. Compare: "A statute creating a court may give it no express authority to issue any warrant, although as a court it has authority to issue bench warrants or attachments to bring before it persons who disobey its subpoena. In such a case, one who is directed to serve a bench warrant is privileged to arrest the person named therein. But any other warrant issued by such a court affords no protection to the officer serving it." RESTATEMENT, TORTS § 124, comment *d* (1934).

198. *Grumon v. Raymond*, 1 Conn. 40 (1814). "But a general warrant upon a complaint of robbery to apprehend all persons suspected, and to bring them before, etc. was ruled void, and false imprisonment lies against him that takes a man upon such a warrant, . . ." 1 HALE P. C. \*580. "And a warrant to apprehend all persons guilty of a crime therein specified is no legal warrant; . . ." 4 BL. COMM. \*291.

199. Art. I, § 7.

200. "The practice in Annapolis of issuing 'warrants of investigation,' without requiring any disclosure of what is proposed to be investigated, has no sanction in law and no justification under our form of government." *Wright v. State*, 177 Md. 230, 236, 9 A. 2d 253, 256 (1939). The problem of a "general warrant" seems never to have arisen except in connection with the "warrant" in the narrowest sense,—process issued by a magistrate on information. A general *capias* (or other process of arrest) would be equally illegal, but circumstances do not tend to produce a general writ of such a nature.

201. 4 BL. COMM. \*291. Circumstances may be sufficient to authorize an officer who has a warrant in his pocket to arrest someone else for that very crime *without a warrant*. If he does so he should not purport to be acting under the warrant. See *infra*, Section III, D, "Authority to Arrest—Without a Warrant."

202. RESTATEMENT, TORTS § 123, comment *a* (1934).

rescinded instructions and proceed to carry out the latest command. Under no circumstances, however, may the warrant be amended by anyone other than the issuing magistrate,<sup>203</sup> even upon his consent "or upon a telephone communication from him."<sup>204</sup> If a sheriff or policeman, for example, should cross out the name written by the magistrate and insert a different name, he would thereby invalidate the warrant.<sup>205</sup>

*Blank warrant.* The device of issuing a warrant with a blank where the name of the accused should be, and handing it to an officer with instructions to fill in the name later, is strictly illegal. A magistrate who issues such a warrant is guilty of official misconduct, and an officer to whom it is handed will have no protection if he seeks to execute it, because it is neither valid nor fair on its face.<sup>206</sup> The officer cannot cure this defect by writing in a name because this would be an amendment by one other than the issuing magistrate.<sup>207</sup> A blank warrant is a typical example of a general warrant within the ban of the constitution.

*"John Doe" warrant.* The "John Doe" warrant cannot be disposed of so simply because it is used in two different ways. If the words "John Doe" are used because the warrant is issued before there is any evidence to indicate who the guilty party may be, and the intent is to permit the officer, after further investigation, to make the arrest and call the suspect "John Doe" for the purpose of that warrant, it is entirely improper and will give the officer no protection at all.<sup>208</sup> This is merely another form of the forbidden general warrant.

If a particular person is intended, known by sight but not by name, a different type of "John Doe" warrant is permissible. The constitutional bar against a general warrant in which the person accused is "not named"<sup>209</sup>

203. RESTATEMENT, TORTS § 123, comment b, 7 (1934).

204. See *State ex rel. Henderson v. Cuniff*, 206 S. W. 2d 32, 34 (Tenn. App. M. S. 1947). The court, quoting with approval from 56 C. J. 1238, adds: "Nor can even the issuing officer himself amend the warrant unless the affidavit itself were so amended as to conform to the proposed change or unless the original affiant perform some corporal act which would constitute an oath."

205. See *ibid.* This was a search warrant in which "John Doe" was given as the name of the owner of the property to be searched. An officer crossed out "Joe Doe" and inserted "Johnnie Cuniff." This was done in good faith, for the reason that Johnnie Cuniff was the owner of the premises. The court points out that this was sufficient to invalidate the warrant. In this case, fortunately, the amendment was not made until after the search had been completed and hence the search and seizure were under a valid warrant.

206. *Rafferty v. People*, 69 Ill. 111 (1873). A warrant for the arrest of an unnamed person is void unless it contains such a *descriptio personae* as will supply the lack of the name. *People v. Allison*, 6 Colo. App. 80, 39 Pac. 903 (1895).

207. If a name was added by one other than the issuing magistrate, and it was done with such care that the addition was not obvious, the warrant might be regarded as "fair on its face" if executed by an officer who did not know the facts and acted on the assumption that it had been completed before it was issued.

208. *Allison v. People*, 6 Colo. App. 80, 39 Pac. 903 (1895); *Harwood v. Siphers*, 70 Me. 464 (1880); *Commonwealth v. Crotty*, 10 Allen 403 (Mass. 1865); *Alford v. State*, 8 Tex. App. 545 (1880).

209. Art. I, § 7.

establishes a sound requirement that a warrant of arrest must designate the arrestee. It must not be construed to provide a stranger complete immunity from criminal process by merely refusing to disclose his name. If the name is unknown the spirit of the constitutional requirement can be satisfied by designating the one accused in some other manner. The statute says: "The warrant should specify the name of the defendant, but if it be unknown to the magistrate, the defendant may be designated therein by any name."<sup>210</sup> This also requires construction. If this section should be interpreted to permit the issuance of a warrant of arrest with no guidance as to the person to be apprehended thereunder, it would be in direct violation of the constitutional prohibition against general warrants. It is possible, however, to give it a construction which will not violate the constitution. As said by a New York court: "to designate is to 'point out by distinguishing from others;' to 'indicate by description, or by something known and determinate' (14 Cyc. 229), so that it would appear that the policy of the law is not satisfied merely by declaring that John Doe or Richard Roe, or both of them, these names being generally recognized as being fictitious, have been guilty of a crime. Good faith and the spirit of the law alike demand that the parties who are accused of crime, . . . should be pointed out in the papers, if not by their proper names, then by such descriptions as will enable the parties . . . to know who is intended, . . ." <sup>211</sup>

In the absence of any special requirement it would seem proper, where the name of the person accused is unknown, merely to state this fact and add a description sufficient to identify him.<sup>212</sup> Under the Tennessee provisions it would be better to designate the accused, in such a case, as—"John Doe, whose other or true name is unknown, but who is described as follows: . . ." <sup>213</sup>

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210. § 11524.

211. *People ex rel. Sampson v. Dunning*, 113 App. Div. 35, 98 N. Y. Supp. 1067, 1068 (2nd Dep't 1906). "A warrant for the arrest of the person named therein as defendant, to wit, 'John Doe, a Chinese person, whose true name is unknown,' would be absolutely void, and afford no protection to an officer who should arrest any person in supposed obedience to its command, because from such a description no particular person could be identified as the one against whom it was issued." *United States v. Doe*, 127 Fed. 982, 983 (N. D. Cal. 1904). The constitutional provision is intended to insure the common law bar against general warrants. Of this Blackstone says: "A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion." 4 BL. COMM. \*291.

212. See *Spear v. State*, 120 Ala. 351, 25 So. 46 (1899). Blackstone says, "Naming or particularly describing." 4 BL. COMM. \*291.

213. "Such a warrant must, in addition, contain the best descriptio personae possible to be obtained of the person or persons to be apprehended, and this description must be sufficient to indicate clearly the proper person or persons upon whom the warrant is to be served; and should state his personal appearance and peculiarities, give his occupation and place of residence, and any other circumstances by means of which he can be identified." 1 WHARTON, CRIMINAL PROCEDURE § 28 (10th ed., Kerr, 1918). "The person to be arrested may not be described otherwise than by name, unless his name is unknown and the fact that it is unknown is stated in the warrant. If the name

Problems of the search warrant and the arrest warrant have much in common,—but not at this particular point. Ordinarily the place to be searched can be designated much more precisely by other means than by the name of the owner and where this is done the name of the owner is not required.<sup>214</sup> Hence a "John Doe" warrant issued for the purpose of search has nothing in common with such a warrant intended for the purpose of arrest unless the former contemplates a search of the offender's person.<sup>215</sup>

#### e. *Life of a Warrant*

In another respect also the two types of warrant are entirely different. A search warrant is good only for a period of five days after its date. It must be executed and returned within that period or it is void.<sup>216</sup> If for any reason the search cannot be made during this time a new warrant is indispensable. There is no corresponding limitation to the life of a warrant of arrest and it is valid until executed unless withdrawn by the issuing magistrate.<sup>217</sup> After a warrant has been executed and returned it is *functus officio*, and no longer of any validity.<sup>218</sup>

### 2. Execution of the Warrant

It has been shown that, while an obviously void warrant gives no protection, one which is either valid or fair on its face gives complete protection to a duly authorized officer, and, it may be added, to one with proper authority even if not an officer,<sup>219</sup> if it is executed in a proper manner. This invites inquiry as to authorization and manner of execution. Insofar as the lawfulness or unlawfulness of an arrest is dependent upon factors quite apart from a warrant, consideration will be postponed until after arrest without a warrant has received attention. Before leaving arrest under a warrant, however, it is

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of the person intended to be arrested is unknown, and the fact that it is unknown is stated in the warrant, any other description is sufficient if it identifies him to a reasonable certainty, in any other way than by describing him as the person who has committed or is committing the offense charged in the warrant." RESTATEMENT, TORTS § 125, comment *g* (1934).

214. The constitutional reference to name applies only to the phrase "to seize any person or persons." Art. I, § 7. § 11524 requires the name of the defendant in an arrest warrant, if the name is known; but § 11901 says that the other type of warrant shall command the officer "to search the person or place named." And the form suggested in the following section includes this clause: "to make immediate search on the person of C D [or 'in the house of E F,' or 'in the house situated,' describing it, . . .]" The description of the premises "would have been good under our holdings if no name at all had been inserted." *Collins v. State*, 184 Tenn. 356, 360, 199 S. W. 2d 96, 97 (1947).

215. See *Renner v. State*, 216 S. W. 2d 345 (Tenn. 1948); *Seals v. State*, 157 Tenn. 538, 11 S. W. 2d 879 (1928).

216. § 11907.

217. "Such warrants do not expire by lapse of time, nor by being returned to the clerk unexecuted." *McKay v. Woodruff*, 77 Iowa 413, 415, 42 N. W. 428, 429 (1889). It was recently held that a deportation warrant, which is a warrant of arrest and deportation, was *prima facie* valid although it had been outstanding for 11 years. *Bellaskus v. Crossman*, 164 F. 2d 412 (5th Cir. 1947).

218. *McQueen v. Heck*, 41 Tenn. 212 (1860). There is special authority to rearrest a prisoner who escapes. §§ 11545-46.

219. See, for example, § 11529, "any suitable person."

important to consider (a) execution, (b) by whom, (c) where, (d) arrest of whom, (e) possession of the warrant, (f) exhibition of the warrant, and (g) return of the warrant.

a. *Execution*

The word "execute" comes from *ex*, meaning "out," and *sequi*, meaning "follow." Hence it means to follow out,—to carry out or perform.

It is not the province of a judge to carry out the judgments he pronounces in criminal cases. This is to be done by other officials. A judgment that a defendant pay a certain fine is carried out or *executed* by the collection of the stipulated amount. A judgment of imprisonment is *executed* by the incarceration of the prisoner in the place indicated and for the specified term. A judgment of death is *executed* by taking the life of the convict in the manner directed. Technically, therefore, in a capital case it is the *sentence* that is executed rather than the prisoner. The result of the execution of such a sentence is the death of the prisoner. The use of the words "execute" and "execution" as applying to the person affected was probably in the nature of slang in its origin. The continuance of this usage for many generations has made it entirely respectable but this should not be permitted to interfere with the strictly proper use of the word "execute."

Some papers handed to officers are *served* while others are *executed*. An officer with a summons is expected to read it, or offer to read it, to the defendant.<sup>220</sup> An officer with a warrant of arrest is expected to take the person accused therein into custody and deliver him to the issuing magistrate (or take him elsewhere as directed).<sup>221</sup> The difference between what is done is the difference between "service" and "execution." A summons is served; a warrant is executed.<sup>222</sup>

b. *By Whom*

The rule of the common law is that a warrant of arrest can be executed lawfully only by one to whom it is directed,<sup>223</sup> except that if it is directed to an officer who has a deputy it may be executed by either, since a

220. § 8662.

221. §§ 11521, 11523.

222. The distinction has not always been recognized. In one case the court, referring to the type of writ, used the phrases "served a warrant" and "execute the process" on the same page. *State v. Withers*, 66 Tenn. 16, 17 (1872). § 11611 uses "execute" in the body but "service" in the caption. § 3343.1 uses "serve" in both. For the most part, however, the code employs "execute" for the warrant. See, for example, §§ 3343, 11522, 11526, 11528, 11529, 11534, 11619, 11903, 11904, 11905, 11907.

223. *People v. Moore*, 2 Doug. 1 (Mich. 1845). An oral instruction by a sheriff to a constable to execute a warrant directed to the sheriff does not amount to deputization and does not authorize the constable to execute the warrant at common law (*ibid.*), unless he is merely assisting the sheriff in making the arrest in the latter's presence. *Commonwealth v. Black*, 12 Pa. Co. Ct. 31 (1887). By the early common law a sheriff having a warrant directed to him seems to have had power to authorize others to execute it; while every other person to whom a warrant was directed was required to execute it in person except that he could call upon others to assist him. 2 HAWK. P. C., c. 13, § 29 (6th ed., Leach, 1788).

duly qualified deputy "possesses all the powers of his principal"<sup>224</sup> in the absence of some statutory limitation.<sup>225</sup> The statute says that a warrant issued by a magistrate upon information of a public offense "should be directed to any lawful officer of the state, but if executed by any officer having authority, it is valid without regard to its direction."<sup>226</sup> This completely supersedes the common law rule on this point, and provides in effect that every such warrant is in law directed to any lawful officer of the state whether so worded or not. It may effect another change. At common law a warrant might be directed either to an officer or to a private person;<sup>227</sup> but the legislative statement that the ordinary warrant "should be directed to any lawful officer of the state" plus the provision that if the warrant is issued by a judge of the supreme, circuit, or criminal court, "such judge may empower, by special direction embodied in the warrant, any suitable person, by name, to execute such warrant,"<sup>228</sup> may be held to deprive other magistrates of the power to direct a warrant to a private person.<sup>229</sup>

A *capias* issued for the arrest of a defendant after indictment should be directed "to all sheriffs in the state" and the statute adds that it may be executed by any sheriff or deputy.<sup>230</sup> This, however, must be read in connection with other sections. In another part of the code it is provided that any "sheriff or deputy sheriff, constable, coroner, or any other officer of any county in this state," having in his hands a *warrant* or *capias* for the arrest of any person charged with the commission of a crime, may execute such process.<sup>231</sup> This authorizes any county peace officer to execute such a *capias*, as well as a warrant and still another section gives to city peace officers, within the municipality, the same authority to execute "*state*

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224. *Winkler v. State*, 32 Ark. 539, 547 (1877).

225. For certain special limitations on the power of a deputy,—other than a peace officer—see IOWA CODE § 341.6 (1946).

226. § 11522.

227. 2 HALE P. C. \*110. If directed to a private person it might lawfully be executed by him although he was not bound to do so. *Ibid.*

228. § 11529.

229. The statute is quite specific as to the search warrant. "The warrant may be executed by any one of the officers to whom it is directed, but by no other person, except in aid of such officer, at his request, he being present and acting in its execution." § 11903.

An officer has no power to delegate his authority under a warrant to a private person, although he may call upon the latter for assistance in making the arrest. RESTATEMENT, TORTS § 123, comment *b*, 5 (1934). Calling for assistance or orally directing another to execute a warrant is not deputization. *People v. Moore*, 2 Doug. 1 (Mich. 1845). But one who has been duly deputized is a peace officer. *State v. Seery*, 95 Iowa 652, 64 N. W. 631 (1895); *State v. Parker*, 81 Tenn. 221 (1884). A person assuming to act as an officer may be liable for a trespass in making an arrest. See *State v. Withers*, 66 Tenn. 16 (1872). It was held in this case that a secret detective appointed by the mayor, who undertook to execute a warrant, was not guilty of falsely assuming to act as an officer because he did not pretend to be other than he was but merely misunderstood his authority.

230. § 11611.

231. § 11528.

warrants and other process, as constables have under the laws of the state.”<sup>232</sup>

Thus any such warrant or *capias* may be executed by any county or city<sup>233</sup> peace officer to whom it is delivered except that to some extent the question by whom process may be executed is dependent upon where it is executed.

c. *Where*

Under the English common law a warrant issued by a judge of the King's Bench extended all over the kingdom, and was dated merely “England,” but a warrant issued by a justice of the peace was good only in his own county.<sup>234</sup> Under the original procedure, if the arrest could not be made in the county in which a warrant was first issued a new warrant was necessary to authorize the apprehension in a second county (and a third, for a third, and so forth), but later the method was simplified and the original warrant could be executed in any county if it was “backed” (indorsed) by a justice there.<sup>235</sup> Some of the states in this country have followed that plan in modified form,<sup>236</sup> but in a majority of the jurisdictions a warrant may be executed anywhere in the state without additional indorsements. Statutes of the latter type have numerous variations in detail but disclose in effect three major patterns: the warrant may be executed anywhere in the state,—(1) by an officer of the county in which it was issued; (2) by any officer in his own county; or (3) by any officer.<sup>237</sup>

The Tennessee statutes at one time provided for execution in any county by any officer (or other suitable person) if he was designated by name and expressly so empowered in a warrant issued by a judge of the supreme,

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232. § 3343 (italics added.)

“The members of the police force shall possess all the common law and statutory powers of constables except for the service of civil process. . . .” CITY OF NASHVILLE CODE, c. 25, § 5 (1947).

233. The statement in the text has reference to the general authority under the code. Departmental regulations might limit the authority of certain members of the force. *Yarn v. City of Atlanta*, 203 Ga. 543, 47 S. E. 2d 556 (1948).

234. A. L. I. CODE OF CRIMINAL PROCEDURE 190 (Official Draft with Commentaries, 1931).

235. 4 BL. COMM. \*291.

236. “Section 3272 of the Code 1923, provides that, when a warrant of arrest is issued by a judge of the Supreme Court, or Court of Appeals, or circuit court, or by a judge of any court of record, such warrant may be executed in any county in this state. The same section also provides, however, if said warrant is issued by any other magistrate, it can only be executed in the county in which it was issued, unless the defendant is in another county; and, when the defendant is in another county, it may be executed therein, but only upon a written indorsement on the warrant by a magistrate of that county signed by him, and giving authority that the warrant may be executed in said county.” *Young v. State*, 22 Ala. App. 468, 469, 117 So. 3, 4 (1928). Twelve states were found with some provision for indorsement of a warrant which was to be executed in a county other than that in which it was issued: Alabama, California, Florida, Maryland, Missouri, New Jersey, New York, North Carolina, Oregon, South Carolina, Virginia, West Virginia. A. L. I. CODE OF CRIMINAL PROCEDURE 195-96 (Official Draft with Commentaries, 1931).

237. The American Law Institute found ten variations of the provision allowing execution of the warrant anywhere in the state without indorsement. CODE OF CRIMINAL PROCEDURE 190-95 (Official Draft with Commentaries, 1931).



circuit, or criminal court;<sup>238</sup> whereas the general provision (*i.e.*, warrants issued by other magistrates or by one of the judges named above but without special direction) merely authorized execution by any officer *within his own county*.<sup>239</sup>

The provision with reference to a warrant issued by a judge of the supreme, circuit, or criminal court has remained unchanged.<sup>240</sup> The general provision is still on the books: "It may be executed by any sheriff, or officer acting as sheriff, or his deputy, or constable, or marshal, or policeman of any city or town, *acting within their county*, or by any person otherwise authorized by law."<sup>241</sup> This, however, has been modified greatly by reason of an additional section which now provides: "When the sheriff or deputy sheriff, constable, coroner, or any other officer of any county in this state, shall have in his hands a warrant or capias for the arrest of any person charged with the commission of a crime, it shall be lawful for the sheriff, deputy sheriff, constable, coroner, or any other officer, to execute such process, and arrest the person so charged in any county in this state."<sup>242</sup>

This added section clearly removes the limitation "acting within their county" as far as county officers are concerned and leaves it applicable only to city marshals or policemen. With reference to such officers it is necessary to consider still another section, which reads: "The corporate officers charged with execution of process, civil or criminal, shall have power *within said municipality* to execute state warrants and other process, as constables have under the laws of the state."<sup>243</sup> The doubt created by this conflict is heightened by a clause which expressly authorizes a city officer, of any municipality having a city or municipal court, to execute a warrant charging a municipal offense anywhere within the county.<sup>244</sup>

The Tennessee law with reference to *where* criminal process may be executed *by whom* may be summarized as follows:

(1) A county peace officer having in his hands a state warrant or capias may execute it anywhere in the state.<sup>245</sup>

238. TENN. CODE § 5030 (1858).

239. *Id.* § 5028.

240. § 11529. "When issued by a judge of the supreme, circuit, or criminal court, it may be executed in any county in the state; and such judge may empower, by special direction embodied in the warrant, any suitable person, by name, to execute such warrant anywhere in the state."

241. § 11526. Italics added.

242. § 11528. See *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906). This section was added in 1871. Tenn. Acts 1871, c. 50.

243. § 3343 (italics added).

244. § 3343.1 "Any duly and regularly appointed police officer of a municipality within the state having a duly constituted city or municipal court, shall have authority to serve warrants for the arrest of persons for municipal offenses committed within the municipal limits, at any point within the county wherein the municipality is located."

245. § 11528. There is still in the Code a section which is quite unnecessary now as far as direction and execution are concerned. "When the person accused has fled, or resides out of the county where the offense was committed, the warrant may issue

(2) A city police officer having in his hands a state warrant or *capias* has authority to execute it within his municipality,<sup>246</sup> but probably does not have authority to execute it beyond the city limits.<sup>247</sup>

(3) A city police officer of a municipality having a city or municipal court may execute a city warrant anywhere in the county wherein the city is located.<sup>248</sup>

*Recapture after escape.* The rule of the common law limiting the execution of a justice's warrant to the county in which it was issued (unless it was "backed" by a justice of another county),<sup>249</sup> plus the rule that an officer could exercise his authority as such only within his bailiwick,<sup>250</sup> required a special provision with regard to the recapture of a prisoner who escaped or was rescued from lawful custody. This ancient rule has been codified as follows: "If a person arrested escape or be rescued, the person from whose custody he escaped or was rescued may immediately pursue and retake him at any time, and in any place within the state."<sup>251</sup>

Under this rule a city police officer who has made a lawful arrest may pursue and retake an escaping prisoner anywhere in the state. Constructive imprisonment is important in this connection. If an arrestee runs from an officer who has authority to arrest him, after being notified and barely touched by the officer, there has been a technical escape and this special provision applies.

*Within the state.* Needless to say, writs of a state can have no force beyond its territorial boundaries; hence an arrest in Kansas by a deputy sheriff of Oklahoma under a warrant from a district court of Oklahoma was unlawful.<sup>252</sup>

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to any lawful officer of any county in the state, and the accused may be brought before the magistrate issuing the warrant, or any other magistrate." § 11527.

246. § 3343.

247. § 11526, using the phrase "within the county" is in the chapter dealing generally with warrants of arrest, whereas § 3343 is in the chapter headed "limitations and restrictions applicable to corporations organized under this chapter." The fact that § 3343 limits the execution of state warrants by city officers to the municipality while § 3343.1 extends the power of such officers (in certain cities) to execute city warrants anywhere in the county adds strength to the conclusion suggested in the text.

248. § 3343.1.

249. 4 BL. COMM. \*291.

250. *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906); *Martin v. Houck*, 141 N. C. 317, 54 S. E. 291 (1906).

251. § 11545. Many states have a similar statute. A. L. I. CODE OF CRIMINAL PROCEDURE 258 (Official Draft with Commentaries, 1931). As it is a legislative restatement of the common law, the rule would be the same without a statute.

252. *Stuart v. Mayberry*, 105 Okla. 13, 231 Pac. 491 (1924); *cf. Drake v. Keeling*, 230 Iowa 1038, 299 N. W. (1941); *see Tarvers v. State*, 90 Tenn. 485, 495, 16 S. W. 1041, 1043-44 (1891). The fact that an Oklahoma statute required its sheriff to be ordered to do so by the county attorney before going outside the state to serve criminal process, and that a sheriff was so ordered and was paid by the county for this purpose does not authorize him to arrest in another state a person named in the Oklahoma warrant and return such person to Oklahoma. *Kirk v. Askew*, 32 F. Supp. 802 (E. D. Okla. 1940).

d. *Arrest of Whom*<sup>253</sup>

A warrant gives full authorization for the arrest of the person named or described therein, even if the apprehending officer knows him to be innocent of the crime charged in the warrant.<sup>254</sup> It also gives such authorization even if by reason of some error this is not the one intended, unless the apprehending officer "knows or is convinced beyond a reasonable doubt that a mistake has been made."<sup>255</sup> On the other hand, it will give no protection to an officer who has arrested a person not named or described therein<sup>256</sup> unless the arrestee himself has knowingly caused the officer to believe he is in fact the one.<sup>257</sup> This is true although the officer may have made the mistake in the utmost good faith,<sup>258</sup> because of the extraordinary resemblance of the one arrested to the one named,<sup>259</sup> or even by reason of misinformation received from persons who are reasonably supposed to know.<sup>260</sup> The innocent mistake may reduce damages but cannot justify the arrest.<sup>261</sup> Even the one actually intended, when information of the crime was given to the magistrate, may not lawfully be arrested under a warrant which uses some other name by which he has never been known,<sup>262</sup> unless there is added some description which identifies him,<sup>263</sup> or unless it is a mere case of misspelling or similar error which leaves the name used phonetically very similar to the name of the arrestee.<sup>264</sup>

253. See Notes, 44 Am. Dec. 291 (1883), 51 L. R. A. 193, 219 (1901).

254. RESTATEMENT, TORTS § 123, comment *a* (1934).

255. RESTATEMENT, TORTS § 125, comment *f* (1934). This comment continues: "Thus, the actor is privileged to arrest the person to whom the name applies with complete accuracy, although the actor may have reason to suspect that a mistake has been made and that the person though accurately named is not the person intended. On the other hand, the actor is not privileged to arrest the person who though accurately named is not the person intended, if the actor knows by his own senses, or has information which leaves no room reasonably to doubt, that a mistake has been made."

256. *Simpson v. Boyd*, 212 Ala. 14, 101 So. 664 (1924); *Holmes v. Blyler*, 80 Iowa 365, 45 N. W. 756 (1890); *Hays v. Creary*, 60 Tex. 445 (1883); *Wallner v. Fidelity and Deposit Co. of Maryland*, 33 N. W. 2d 215 (Wis. 1948).

257. RESTATEMENT, TORTS § 125(h) (1934). And see *Johnston v. Riley*, 13 Ga. 97, 137 (1853); *Hays v. Creary*, 60 Tex. 445 (1883).

258. *Holmes v. Blyler*, 80 Iowa 365, 45 N. W. 756 (1890); *Hays v. Creary*, 60 Tex. 445 (1883).

259. "A holds a warrant directing him to arrest XYZ. A mistakes B for XYZ, being misled by B's extraordinary likeness to him. A is not privileged to arrest B." RESTATEMENT, TORTS § 125, illustration 1 (1934).

260. *Id.* at illustration 2. An officer with a warrant for the arrest of Edward Eccles took Frank A. Wallner into custody in the good faith belief that he was Eccles. Wallner had been pointed out to him as Eccles. This was held to be a false arrest. *Wallner v. Fidelity and Deposit Co. of Maryland*, 33 N. W. 2d 215 (Wis. 1948).

261. *Holmes v. Blyler*, 80 Iowa 365, 45 N. W. 756 (1890). *Wallner v. Fidelity and Deposit Co. of Maryland*, 33 N. W. 2d 215 (Wis. 1948).

262. *Harris v. McReynolds*, 10 Colo. App. 532, 51 Pac. 1016 (1898); *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643 (1894); see *Johnston v. Riley*, 13 Ga. 97, 137 (1853). "The fact that the person arrested is the person intended by the warrant does not make his arrest privileged unless he is sufficiently named or otherwise described." RESTATEMENT, TORTS § 125, comment *b* (1934). But see *Wilson v. Lapham*, 196 Iowa 745, 195 N. W. 235 (1923).

263. See the inference to this effect in *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643 (1894).

264. *O'Neill v. Keeling*, 227 Iowa 754, 288 N. W. 887 (1939). "A person is sufficiently

*Two with same name.* An additional factor must be considered if two or more persons have the name used in the warrant. If the name or description in the warrant accurately fits the person arrested, the officer will be protected if he reasonably believed this was the one intended even if the warrant was actually issued for the arrest of someone else having the same name or description.<sup>265</sup>

*One with two names.* If the person to be arrested is known by more than one name it is unimportant that the name used in the warrant may be an alias rather than his true name.<sup>266</sup> Although not required, it is desirable to have both the true name and the alias appear in the warrant, if they are known, because this may aid the officer in his search for the arrestee.

*Dual authority.* If the officer purports to make the arrest under a warrant, and takes into custody one not named or described therein, the imprisonment is unlawful, under the prevailing view, even if the officer could have arrested that very person lawfully without a warrant<sup>267</sup> unless, at the time of apprehension, the officer "manifests his intention to arrest on suspicion as well as under the warrant."<sup>268</sup>

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named, if both the Christian name and the surname, although inaccurately spelled, are phonetically closely similar to such a person's name. This is usually expressed by the statement that the names are *idem sonans*." RESTATEMENT, TORTS § 125, comment *c* (1934). Thus where Henry Robertson was arrested, under a warrant intended for him, the arrest was privileged although the warrant said Hendry Roberson. *Ibid.* The rule of "*idem sonans*" (same sound) arose at a time when the average man was unable to read, so that the spelling was unimportant. It has been retained as a common sense recognition of the fact that inaccuracy in the spelling of names is quite common.

265. *O'Neill v. Keeling*, 227 Iowa 754, 288 N. W. 887 (1939). "If there are two or more persons, within the bailiwick of the officer in whose hands the warrant is placed, bearing the same name, the officer is charged with the duty of ascertaining, before making an arrest, which of such persons the warrant was intended for. If he decides this question in good faith, he is not a trespasser in making the arrest, although he may make a mistake and arrest the wrong person." *Blocker v. Clark*, 126 Ga. 484, 488-89, 54 S. E. 1022, 1023-24 (1906). The first sentence of the quotation above assumes that the officer knows, or has reason to know, that there are two having the same name. RESTATEMENT, TORTS § 125, comment *d* (1934).

The rule of *idem sonans* must be considered in this connection. If the warrant uses the name John Johnson and there is a John Johnson and also a John Johnston in the bailiwick, the officer should ordinarily arrest the former thereunder. But if the officer knows that Johnston was intended by the warrant, or knows facts which indicate clearly that such is the case, he would be privileged to arrest Johnston, but not Johnson, under this warrant. *Id.* at comment *f*.

266. RESTATEMENT, TORTS § 125, comment *e* (1934). "The maiden name of the person intended by the warrant is Mary Brown. She is secretly married and her married name is Mary Jones. She is a moving picture actress and appears under the name of Gloria Moore. Her arrest is privileged under a warrant naming her as either Mary Brown, Mary Jones, or Gloria Moore or as Mary Brown alias Mary Jones or Mary Jones alias Gloria Moore." *Id.* at illustration 7.

267. The general rule is that if the officer purports to make the arrest under a warrant, and cannot justify the apprehension on that basis, the arrest is unlawful even if the officer could lawfully have arrested that very person without a warrant. *Holmes v. Blyler*, 80 Iowa 365, 45 N. W. 756 (1890); *Elwell v. Reynolds*, 6 Kan. App. 545, 51 Pac. 578 (1897); *MacDonnell v. McConville*, 148 App. Div. 49, 132 N. Y. Supp. 1085 (1st Dep't 1911), *aff'd*, 210 N. Y. 529, 103 N. E. 1126 (1913).

268. RESTATEMENT, TORTS § 122, comment *b* (1934). This was said with reference to a warrant neither valid nor fair on its face, but the added protection given by the double statement of authority would apply in one situation as well as in the other. Compare the officer's statement of two causes of arrest, one proper and the other im-

The strict rule of the common law requiring an officer arresting under a warrant to see to it, at his peril, that he did not take into custody one not named or described therein (unless misled by the arrestee himself) may have been suited to the conditions of rural life in England in the early days. At the present time, however, it would seem wise to change this rule, by statute, in order to protect an officer who has made a mistake as to the person, if the officer acted in good faith and upon reasonable grounds. And it would seem wise to provide (by statute if necessary) that an arrest is lawful if the officer had authority to take into custody the very person apprehended, even if he purported to make the arrest only under the warrant whereas his actual authority was to arrest without a warrant.<sup>269</sup>

*e. Possession of the Warrant*<sup>270</sup>

Although it is directed to "any lawful officer of the state,"<sup>271</sup> something more than the issuance of the warrant is needed to give any particular officer authority to execute it. The common statement is to the effect that it may be executed by any such officer who "shall have in his hands"<sup>272</sup> such warrant, or "into whose hands such warrant may come."<sup>273</sup> This is in recognition of the common law rule that an arrest under a warrant is not privileged unless the arrester has possession of the warrant at the time of the arrest.<sup>274</sup> The issuance of a warrant charging a felony may have a bearing on authority to arrest *without a warrant*,<sup>275</sup> under principles to be considered presently, but if reliance is placed upon the warrant *as such* the arrester must have it in his possession at the time of apprehension.<sup>276</sup> Thus if a warrant was necessary for the arrest, and an officer to whom it was merely shown went out on the streets and made the arrest while the warrant remained in the city de-

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proper. *Id.* at § 128, comment *c*. If the prisoner was overtaken in flight, under circumstances which did not permit the usual manifestation of authority, the arrest is lawful if the officer had authority to arrest the prisoner without a warrant, even if the officer was *thinking* of arresting under a warrant which did not name or describe this person.

269. There is some authority for this view, at least where the warrant is void. *Stallings v. Splain*, 253 U. S. 339, 40 Sup. Ct. 537, 64 L. Ed. 940 (1920); *Keel v. State*, 176 Miss. 867, 169 So. 653 (1936); *State v. Sutter*, 71 W. Va. 371, 76 S. E. 811 (1912). And see *Go-Bart Co. v. United States*, 282 U. S. 344, 356, 51 Sup. Ct. 153, 75 L. Ed. 374 (1931). A void warrant is in law no warrant. This, however, seems unimportant in this regard. The question is whether he can justify the arrest under an authority to arrest without a warrant if his only manifestation was an intent to arrest under a warrant. The answer should be in the affirmative.

270. See Note, *Arrest—Necessity of Possession of Warrant by Officer Claiming Arrest Privileged as Under Warrant*, 25 IOWA L. REV. 660 (1940).

271. § 11522.

272. § 11528.

273. See *McCaslin v. McCord*, 116 Tenn. 690 (headnote 1) (1906).

274. RESTATEMENT, TORTS § 126 (1934); *Giddens v. State*, 154 Ga. 54, 113 S. E. 386 (1922); *Hunter v. Laurent*, 158 La. 874, 104 So. 747 (1925); *Crosswhite v. Barnes*, 139 Va. 471, 124 S. E. 242 (1924). The requirement of possession was assumed in *McCully v. Malcom*, 28 Tenn. 187 (1848). It also seems to be implied by the provision of § 11537. "When arresting a person, the officer shall . . . exhibit his warrant if he have one. . . ."

275. RESTATEMENT, TORTS § 126, comment *c* (1934).

276. *Kratzer v. Matthews*, 233 Mich. 452, 206 N. W. 982 (1926); *McCullough v. Greenfield*, 133 Mich. 463, 95 N. W. 532 (1903); *Smith v. Clark*, 53 N. J. L. 197, 21 Atl. 491 (1891).

tective bureau, the arrest was unlawful.<sup>277</sup> And if a sheriff has a warrant for the arrest of a person on a misdemeanor charge it is improper for him to send a constable to make the arrest without sending the warrant with him.<sup>278</sup> "In such a case it is immaterial that the person arrested did not request to see the warrant or that he knew or did not know that the warrant had been issued."<sup>279</sup>

The concept of "possession" requires particular attention. For general purposes of property law a man may keep possession of a thing without taking it with him,—as by locking it in his safe,<sup>280</sup> but this is not what is meant by "possession of the warrant" in the law of arrest. In a general sense the officer must have the warrant with him, but it is not always necessary for him to have it in his hand or in his pocket. In one case, for example, the officer took with him a warrant charging a misdemeanor while he drove to the arrestee's house. Then he left it in the vehicle while he walked 150 to 200 yards and then took the accused person into custody. He was held to have had sufficient possession of the warrant at the time to authorize this arrest.<sup>281</sup>

Where two (or more) are cooperating in the effort to make an arrest it is obviously impossible for both to keep actual charge of the warrant during the apprehension, and this is not required. If one has actual possession of the warrant, this is a justification for both as long as they are acting together; hence when the arrest was made by one officer who had gone into a house to look for the arrestee while his fellow officer with the warrant stood nearby, the protection was complete.<sup>282</sup> This applies also in cases in which a private person has been called upon by an officer to assist in making an arrest. "It is sufficient if the officer requesting assistance is clothed with authority to make the arrest. The warrant in his possession will justify all acting under his direction."<sup>283</sup> In all such cases it is not necessary for the arrest to be made in the immediate presence of the officer having the warrant in his possession.<sup>284</sup>

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277. *People v. Fischetti*, 273 Ill. App. 215 (1933).

278. *Giddens v. State*, 154 Ga. 54, 113 S. E. 386 (1922). If the warrant charged a felony the constable could arrest for that felony without a warrant. *RESTATEMENT, TORTS* § 126, comment *c* (1934). But if so he should be instructed not to purport to make the arrest under a warrant.

279. *Bohlen and Shulman, Arrest with and without a Warrant*, 75 U. OF PA. L. REV. 485, 492 (1927).

280. *Morgan v. Commonwealth*, 242 Ky. 713, 47 S. W. 2d 543 (1932); *Reese v. State*, 91 Tex. Cr. 457, 239 S. W. 619 (1922); and see *RESTATEMENT, TORTS* § 216 (1934).

281. *State v. Shaw*, 104 S. C. 359, 89 S. E. 322 (1916).

282. *Adams v. State*, 175 Ala. 8, 57 So. 591 (1912).

283. *Commonwealth v. Black*, 12 Pa. Co. Ct. 31, 32 (1887). The protection is even greater than this. The call for assistance is usually in an emergency. It would be unwise to require the one called upon to inspect the warrant before coming to the assistance of the officer, and he has no right to demand such inspection. *McMahon v. Green*, 34 Vt. 69 (1861). Hence he is protected, if he has not seen the warrant, even if the warrant in the officer's possession is neither valid nor fair on its face. *RESTATEMENT, TORTS* § 139, comment *d* (1934).

284. A servant of the bailiff might make the arrest although thirty rods away from the bailiff and not in his view, but both must be then occupied in the effort to make the arrest. *Wilson v. Gary*, 6 Mod. 611, 87 Eng. Rep. 963 (Q. B. 1704). A sheriff with

If the two are in the same neighborhood and acting in concert with a view to effect the arrest, this is sufficient.<sup>285</sup>

This is another point at which the common law rule may have been adequately suited to the rural conditions of English life in the early days but is quite unsatisfactory at the present time. With telephone, telegraph, radio, and particularly now with squad cars equipped with radio so that officers in all parts of a large city can be informed of a warrant of arrest almost as soon as it is issued, this ancient requirement should be abandoned. Some cases have shown a tendency to do so<sup>286</sup> and this seems a proper development of the common law to meet changing conditions. Officers, however, should be careful to have possession of warrants they are executing until other authority is clearly established by decision or legislation. The American Law Institute has recommended a statute in this form: "The officer need not have the warrant in his possession at the time of the arrest, but after the arrest, if the person arrested so requires, the warrant shall be shown to him as soon as practicable."<sup>287</sup> This, in substance, has been adopted by some state statutes<sup>288</sup> and by the Federal Rules of Criminal Procedure.<sup>289</sup>

#### f. *Exhibition of the Warrant*

Misinterpretation of an early statement by Lord Hale led to the notion that the ancient common law did not require a known officer, making an

a warrant charging a breach of the peace took a posse with him to make the arrest. Being unable to overcome the resistance of those charged in the warrant he went to a neighboring town for additional help. He took the warrant with him but left several of the posse there to watch the arrestees and to take them into custody if possible. It was held that the men left there could lawfully make the arrest while the sheriff with the warrant was away. *Coyles v. Hurin*, 10 Johns. 85 (N. Y. 1813). It is important to emphasize that the sheriff, with the warrant, had not departed upon other business but was taking steps to insure the arrest.

285. *Robinson v. State*, 93 Ga. 77, 18 S. E. 1018 (1893).

286. See *In re Kosopud*, 272 Fed. 330 (N. D. Ohio 1920). A valid warrant was issued and retained by a United States Marshal who telegraphed his deputy to make the arrest. The deputy, after informing the accused that the warrant had been issued, made the arrest. This was held to be lawful. *Cabell v. Arnold*, 86 Tex. 102, 23 S. W. 645 (1893). A sheriff with a valid warrant wired a description of the accused to the sheriff of another county and requested that the arrest be made there. The second sheriff made an arrest, stating that it was under a warrant. It was held that the second sheriff was authorized to execute the warrant, but under the facts of the case it was for the jury to determine whether he was privileged to arrest the person actually taken into custody by him. *O'Neill v. Keeling*, 227 Iowa 754, 288 N. W. 887 (1939); cf. *Drake v. Keeling*, 287 N. W. 596 (Iowa 1939).

287. CODE OF CRIMINAL PROCEDURE § 24 (Official Draft with Commentaries, 1931). The Uniform Arrest Act has the same provision with a slight difference in the wording, § 8.

288. "Where an arrest is made under a warrant, it shall not be necessary for the arresting officer personally to have the warrant in his possession but such officer must, if possible, inform the person arrested that there is a warrant for his arrest and, after the arrest is made, shall show such person the warrant if required, as soon as practicable." MICH. STAT. ANN. § 28.877 (Henderson, 1935); see also FLA. STAT. ANN. § 901.16 (1944); LA. CODE CRIM. LAW AND PROC. art. 69 (Dart, 1943). The Wisconsin statute also does not require the officer to have possession of the warrant at the time of arrest. WIS. STAT. § 361.44(2) (1945).

289. FED. R. CRIM. P., 4 (c) 3; *United States v. Petti*, 168 F. 2d 221 (2d Cir. 1948).

arrest in his own bailiwick, to show his warrant even upon demand.<sup>290</sup> It is doubtful if this ever was the common law<sup>291</sup> and in any event it is not so at the present time. Exhibition of the warrant is part of the arrester's manifestation of purpose and authority which is excused under certain circumstances to be considered presently. In the absence of such circumstances the requirement of the modern common law is this: A private person executing a warrant of arrest<sup>292</sup> must inform the arrestee of his possession of the warrant and of its contents and upon request must show him the warrant; a peace officer in doing so is not required to exhibit the warrant *prior* to the arrest, but if asked about the matter must state that he is in possession of a warrant and is making the arrest in pursuance thereof, and after the arrest is made he must, if requested, exhibit or read the warrant to the arrestee.<sup>293</sup>

The statute reads: "When arresting a person, the officer shall inform him of his authority and the cause of the arrest, and exhibit his warrant if he have

290. It is said in 1 HALE P. C. \*458 and 2 *id.* \*116 that a commonly known officer need not show his warrant even on demand. Elsewhere he says the officer should show the warrant on demand. 1 *id.* \*583. The explanation seems to be that the two statements do not refer to the same warrant. The warrant by which the officer was appointed need not be shown, but the warrant of arrest should be shown on request. 1 EAST P. C. \*319; Note, *Necessity of Showing Warrant upon Making Arrest under Warrant*, 40 A. L. R. 62, 66 (1926). The ancient rule was stated to be that a known officer, in his own bailiwick, was not required to show his warrant, even upon demand; but unless excused he was required to acquaint the arrestee with the substance of the warrant in order that the reason for the arrest might be known. And if the arrest was by one other than a known officer acting in his own bailiwick he was required to exhibit the warrant if requested to do so. 2 HAWK. P. C., c. 13, § 28 (6th ed., Leach, 1788). The supposed privilege of non-exhibition is quite inconsistent with the insistence that the apprehending officer have the warrant with him at the time, and East says it was required to be shown on demand. 1 EAST P. C. \*319.

291. It has had some following: *Commonwealth v. Irwin*, 1 Allen 587 (Mass. 1861); *Bellows v. Shannon*, 2 Hill 86 (N. Y. 1841). *Contra*: *Regina v. Chapman*, 12 Cox C. C. 4 (1871); *Codd v. McCabe*, 1 Ex. D. 352, 13 Cox C. C. 202 (1876).

"If it be established as law by the cases cited, that it is not necessary to shew the warrant to the party arrested, who demands to see it, I will not shake those authorities; but I cannot forbear observing, that if it be so established, it is a most dangerous doctrine; . . ." *Hall v. Roche*, 8 T. R. 187, 188, 101 Eng. Rep. 1337, 1338 (K. B. 1799). "[I]f no resistance is offered, the officer ought always . . . show his warrant to the party arrested or notify him of the substance of the warrant." *United States v. Rice*, 27 Fed. Cas. 795, 796, No. 16,153 (C. C. W. D. N. C. 1875). Officers who refused to show their warrant upon request saying they "did not have to show it" were held guilty of illegal arrest and assault and battery. They were known officers. *Crosswhite v. Barnes*, 139 Va. 471, 124 S. E. 242 (1924).

292. As, for example, under express direction of a warrant issued by a judge of the supreme, circuit or criminal court, § 11529; by the coroner, § 11890.

293. RESTATEMENT, TORTS § 128, comment *e* (1934). The officer is not required to show the warrant before making the arrest. *State v. Townsend*, 5 Harr. 487 (Del. 1854). Exhibition may be demanded immediately after the arrest. *State v. Shaw*, 104 S. C. 359, 89 S. E. 322 (1916). Showing the warrant is not a part of the arrest but a duty that follows the arrest. *See State v. Taylor*, 70 Vt. 1, 6, 39 Atl. 447, 449 (1898). "These are obviously successive steps. They cannot all occur at the same instant of time. The explanation must follow the arrest; and the exhibition and perusal of the warrant must come after the authority of the officer has been acknowledged, and his power over his prisoner acquiesced in." *Commonwealth v. Cooley*, 72 Mass. 350, 356-57 (1856). "Even in the case of an arrest upon a lawful warrant, the officer is not bound to exhibit his writ of authority until he has made the arrest and secured the prisoner from danger of flight. Then he ought, if demanded, show his authority." *State v. Brown*, 91 W. Va. 709, 715, 114 S. E. 372, 374 (1922).



one, except when he is in the actual commission of the offense, or is pursued immediately after an escape."<sup>294</sup> This does not specify whether the exhibition must precede the arrest or follow it but, in view of the common law, should be interpreted to require no more than that the warrant shall be shown *after* the arrestee has submitted or has been secured. It does make one change in the common law, however. Apart from the exceptions mentioned, the warrant must be shown even without a request by the arrestee.

"In no case, however, is he required to part with the warrant out of his own possession; for that is his justification."<sup>295</sup> Although the officer may always insist upon holding the warrant in his own hands, it may be unwise for him to do so. His effort to hold the paper for the other to read might put him at a disadvantage if the arrestee should suddenly reach for a weapon. If the arrestee is handed the warrant he may throw it away, it is true, but this is not a serious matter. If he does this the officer should ignore the warrant and concentrate his whole attention on his prisoner. The arrestee's wrongful conduct cannot deprive the officer of his authority.<sup>296</sup>

*g. Return of the Warrant*

The return of the warrant expresses a two-fold idea. The paper itself should be returned to the issuing magistrate, or delivered elsewhere if that is the requirement in the particular case.<sup>297</sup> The technical "return" is the written indorsement on the warrant, signed by the officer, showing the manner in which the warrant was executed or the fact that the accused could not be found, or could not be captured, as the fact may be. Since there is a presumption that official records speak the truth, the return on the warrant may be read as evidence, in the officer's favor, to show that he had the warrant in his hands at the time of the arrest.<sup>298</sup>

*B. Oral Order of a Magistrate*

Under the common law a magistrate who saw the commission of a felony or a breach of the peace was authorized either to arrest the offender himself or to order any officer or private person to do so. This order might be given orally and was sufficient authority for the apprehension.<sup>299</sup> This has been

<sup>294</sup> § 11537.

<sup>295</sup> 1 EAST P. C. \*319. And see *State v. Phinney*, 42 Me. 384 (1856).

<sup>296</sup> A lost warrant can be established by secondary evidence. *Commonwealth v. Roark*, 8 Cush. 210 (Mass. 1851). And a duplicate warrant can be issued by the magistrate to replace the lost one.

<sup>297</sup> *Tubbs v. Tuckey*, 3 Cush. 438 (Mass. 1849).

<sup>298</sup> *McCully v. Malcom*, 28 Tenn. 187 (1848); cf. *McBee v. State*, 19 Tenn. 122 (1838). "Any process, warrant, or precept, authorized to be issued by any of the judges, justices of the peace, or clerks of the court, in any criminal prosecution on behalf of the state, may be issued at any time and made returnable to any day of the term." § 11530.

<sup>299</sup> "If a justice of the peace see a felony, or other breach of the peace, committed in his presence, he may . . . by word command any person to apprehend him, and such command is a good warrant without writing; but if the felony or other breach of the peace be done in his absence, then he must issue his warrant in writing under his seal

codified and extended to include any public offense. "When a public offense is committed in the presence of a magistrate, he may, by verbal or written order, command any person to arrest the offender, and thereupon proceed as if he had been brought before him on a warrant of arrest."<sup>300</sup> The last clause of this section must not be overlooked. The authority of the magistrate in such a case is to order the offender to be arrested and brought in for examination,—not to order him to be committed to prison.<sup>301</sup>

Refusal to obey the magistrate's oral order is an offense<sup>302</sup> and knowingly resisting one who is carrying out such order is punished in the same manner as resisting an officer executing legal process.<sup>303</sup>

In an Iowa case dealing with the use of this authority the court held that an officer, ordered to arrest for an offense alleged to have been committed in the presence of the magistrate, has no privilege to make the arrest if he knows that no offense was so committed.<sup>304</sup> This would induce the officer to hesitate in cases in which he was mistaken as to the facts, and is contrary to the prevailing view.<sup>305</sup>

to apprehend the malefactor, . . ." 2 HALE P. C. \*86. "By a justice of the peace, who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence." 4 BL. COMM. \*292. See RESTATEMENT, TORTS § 120(a) (1934).

300. § 11535. "After the indictment is returned into court by the grand jury, the court may direct any defendant present, who has not been arrested, to be taken into custody without process." § 11608. And see § 11443.

301. "No person shall be committed to prison for any criminal matter, until examination thereof be first had before some magistrate." § 11515. As to commitment in case of adjourned hearing, see § 11550. A magistrate saw a misdemeanor committed and ordered a policeman to arrest the offender and "take him to the station house." An action against the magistrate for false imprisonment resulted in a judgment in his favor, but this was reversed because of erroneous instructions. The court said: "While, therefore, a magistrate may order the arrest of any one for a public offense committed in his presence, he has no power to at once, without an examination or hearing, or without informing the offender of the charge against him, commit him to prison. If there be good cause for postponing the hearing, and the offender fail to give bail in a bailable case, then he may be committed until the hearing. But for a magistrate to order the arrest of any one for a misdemeanor committed in his presence, and at once without a hearing, or without cause postponing the hearing to another time, or giving him an opportunity to have counsel or give bail, peremptorily order him to prison is contrary to the very spirit of our bill of rights and the pointed provisions of our statutes." *Touhey v. King*, 77 Tenn. 422, 428-29 (1882).

302. "If any justice or conservator of the peace, upon view of any breach of the peace or other offense for his cognizance, require any person to apprehend and bring before him the offender, any person so required, who refuses or neglects to obey, shall, on conviction, be fined not less than fifty nor more than three hundred dollars." § 11058.

303. "Any one assaulting, beating, or resisting such person so summoned, and acting in obedience to such command, with knowledge of the command, is guilty in the same manner as if he had assaulted, beaten, or resisted an officer in executing legal process, and shall be punished in the same way." § 11059. Resisting an officer in the execution of process is a misdemeanor. § 11044.

304. *State v. Rowe*, 238 Iowa 237, 26 N. W. 2d 422 (1947).

305. "An actor making an arrest pursuant to the oral order of a court is given the same protection as when he makes an arrest under a valid warrant or one fair on its face. It is not necessary that a crime or contempt has been or is being committed. The accused is privileged if the court says that a crime or contempt has been committed by the other and directs his arrest; the actor's knowledge to the contrary is immaterial." RESTATEMENT, TORTS § 120, comment b (1934).

C. *Assisting an Officer (Posse Comitatus)*<sup>306</sup>

The sheriff, being the officer particularly charged by common law with keeping the peace and apprehending wrongdoers, was authorized whenever necessary for such purposes to "command all the people of his county to attend him; which is called the *posse comitatus*, or power of the county; . . ." <sup>307</sup> The power to require such assistance by all able-bodied males of the county included the authority to call upon any such individual; and this has been embodied in the code.<sup>308</sup>

In the course of time it was recognized that any peace officer is authorized to call upon private persons to aid him in making arrests or preventing crimes;<sup>309</sup> and this also has been codified.<sup>310</sup> Special emphasis has been given to requested aid in the execution of a warrant;<sup>311</sup> but the common law applies also where the officer asks for aid in making an authorized arrest without a warrant,<sup>312</sup> and this has been incorporated into the statutes.<sup>313</sup>

Persons acting under such request are "not themselves officers, nor are they mere private persons, but their true legal position is that of a *posse comitatus*." <sup>314</sup> While the term "posse" is more commonly used to signify a considerable group of persons called upon by an officer to aid him in the enforcement of the law, the legal position is not dependent upon the number. An officer may summon a one-man posse.<sup>315</sup>

Every person who assists an officer in making an arrest, at his request,

306. Problems in this field are discussed in Notes, 18 Ann. Cas. 932 (1911), 44 Am. St. Rep. 136 (1895), 14 L. R. A. (N. S.) 1123 (1908).

307. 1 BL. COMM. \*343.

308. "The sheriff and his deputies are conservators of the peace, and, to keep the peace, prevent crime, arrest any person lawfully, or to execute process of law, may call any person or summon the body of the county to their aid." § 699. "The sheriff is the principal conservator of the peace in his county, and it is his duty to suppress all affrays, riots, routs, unlawful assemblies, insurrections, or other breaches of the peace, to do which, he may summon to his aid as many of the male inhabitants of the county as he thinks proper." § 11418.

309. 1 WHEARTON, CRIMINAL PROCEDURE § 41 (10th ed., Kerr, 1918).

310. "The judicial and ministerial officers of justice in the state, and the mayor, alderman, marshals, and police of cities and towns, are also conservators of the peace, and required to aid in the prevention and suppression of public offenses, and for this purpose may act with all the power of the sheriff." § 11419. "If any person, being lawfully required by any officer, wilfully neglect or refuse to assist him in the execution of his office in a criminal case, or in any escape or rescue, he shall be guilty of a misdemeanor." § 11057.

311. "All officers authorized to execute judicial process, who find or have reason to apprehend, that resistance will be made to the execution thereof, may command the aid of the male inhabitants as above prescribed for suppressing riots." § 11420. The sheriff can call upon the governor for a posse or military force from other counties, if necessary. § 11421. "If any person commanded to aid, under the provisions of this chapter, any magistrate or officer, without good cause, refuses or neglects to obey such command, he is guilty of a misdemeanor." § 11422. "Every person shall aid an officer in the execution of a warrant, if the officer require his aid, and is present and is acting in its execution." § 11534.

312. 4 BL. COMM. \*293.

313. §§ 699, 11057, 11419.

314. Robinson v. State, 93 Ga. 77, 83, 18 S. E. 1018, 1019 (1893).

315. "A *posse* may be summoned under the form of 'deputizing' the person or persons composing it." *Ibid*.

has the same protection that is accorded the officer himself, and acting in such capacity he may resort to the same measures to secure the arrest of the accused.<sup>316</sup> Hence a private person making an arrest while assisting an officer at the latter's request, in a case in which no warrant had been issued, has full authority to do so if the law authorizes an *officer* to arrest without a warrant in such a case, even though the ordinary citizen would have no such privilege were he not assisting an officer.<sup>317</sup> And if an officer charged with the execution of a warrant directs another person to execute it in his presence, such an arrest will be legal though the officer retains the possession of the process and although the actual arrestor would not ordinarily be authorized to execute a warrant of arrest.<sup>318</sup> "Constructive presence" of the officer is sufficient for this purpose, it may be added.<sup>319</sup>

A person called upon by an officer for assistance in making an arrest is guilty of a misdemeanor if he improperly refuses.<sup>320</sup> Furthermore, he is not entitled to delay while he conducts an inquiry into the officer's authority in the particular case.<sup>321</sup> Hence he is privileged not only to the extent of the actual authority of the officer, but is protected even if the latter is actually exceeding his authority,<sup>322</sup> as long as the individual does not know or have reason to know of the lack of authority.<sup>323</sup>

Just as an officer may require a private person to assist him in making an

316. See *Commonwealth v. Fields*, 120 Pa. Super. 397, 401, 183 Atl. 78, 80 (1936); *Byrd v. Commonwealth*, 158 Va. 897, 164 S. E. 400 (1932). Compare: "Whenever the officers of justice are authorized to act in the prevention of public offenses, other persons who, by their command, act in their aid, are justified in so doing." § 11417.

317. See *Commonwealth v. Fields*, 120 Pa. Super. 397, 401, 183 Atl. 78, 80 (1936).

318. *Robinson v. State*, 93 Ga. 77, 18 S. E. 1018 (1893). See also *Martin v. Commonwealth*, 257 Ky. 591, 78 S. W. 2d 786 (1935).

319. *Robinson v. State*, 93 Ga. 77, 18 S. E. 1018 (1893). See *supra*, Section III, A, 2, e, "Possession of the Warrant." "The question in these cases does not turn upon the fact of distance, so long as the sheriff is within his county, and is *bona fide* and strictly engaged in the business of the arrest." *Coyles v. Hurin*, 10 Johns. 85, 88 (N. Y. 1813).

320. §§ 11057, 11422; 1 HALE P. C. \*588; 1 BL. COMM. \*343; 4 *id.* \*293. A private person has no right to refuse to assist an officer in making an arrest merely because danger is involved; but if the effort would be futile as well as dangerous his refusal will be excused under extreme circumstances. *Dougherty v. State*, 106 Ala. 63, 17 So. 393 (1895).

321. "We do not think that a man called upon by the sheriff . . . may refuse to act until he is satisfied that the sheriff is acting legally, . . ." *Firestone v. Rice*, 71 Mich. 377, 380, 38 N. W. 885, 886 (1888). He is not entitled to demand an inspection of the warrant. *McMahan v. Green*, 34 Vt. 69 (1861).

322. *Watson v. State*, 83 Ala. 60, 3 So. 441 (1888); *Dehm v. Hinman*, 56 Conn. 320, 15 Atl. 741 (1887); *Reed v. Rice*, 2 J. J. Marsh. 44 (Ky. 1829); *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885 (1888). And see *Jefferson v. Yazoo and M. V. R. R.*, 194 Miss. 729, 11 So. 2d 442 (1943); RESTATEMENT, TORTS § 139(2) and comment *d* (1934). *Contra*: *Mitchell v. State*, 12 Ark. 50 (1851).

Where the person making the request for assistance is not a known officer, the person aiding him is not protected under this rule if the arrest is unauthorized. *Dietrichs v. Shaw*, 43 Ind. 175 (1873).

323. RESTATEMENT, TORTS § 139(2) and comment *d* (1934). An officer who assists another in an obviously unlawful arrest is not protected by the mere fact that the other requested assistance. *Roberts v. Commonwealth*, 284 Ky. 365, 144 S. W. 2d 811 (1940). On the other hand, one who is himself privileged to make an arrest is not deprived of that privilege because he is responding to a call for assistance by another who has no such authority. RESTATEMENT, TORTS § 139, comment *a* (1934).

arrest, so he may commandeer private property, such as an automobile, if this is reasonably necessary under the circumstances.<sup>324</sup>

The law has been very tardy in providing indemnification for personal injury or property damage suffered by one assisting an officer in making an arrest.<sup>325</sup>

#### D. *Without a Warrant* <sup>326</sup>

It has been said: "All arrests are made in either of two ways—(1) with a warrant, (2) without a warrant."<sup>327</sup> On its face this statement seems almost too obvious to be entitled to mention; actually it is oversimplification carried to the point of inaccuracy. It seems logically impossible to have an arrest other than with a warrant or without a warrant; but the problem is one not of logic, but of the use of words.

Three special types of authority to make an arrest have been shown: (1) The written command of a magistrate ordering the arrest; (2) the oral order of a magistrate to arrest for an offense committed in his presence; and

324. RESTATEMENT, TORTS § 271 (1934). Thus officers might commandeer a taxicab and the driver if circumstances made this necessary. *Babington v. Yellow Taxi Corp.*, 250 N. Y. 14, 164 N. E. 726 (1928).

325. Illinois has made the following provision for cases arising in cities of 500,000 population or over: "If any person in obeying the command of any such policeman to assist in arresting or securing an offender is killed or injured or his property or that of his employer is damaged and such death, injury or damage arises out of and in the course of aiding such policeman in arresting or endeavoring to arrest a person or retaking or endeavoring to retake a person who has escaped from legal custody, the person or employer so injured or whose property is so damaged or the personal representative of the person so killed shall have a cause of action to recover the amount of such damage or injury against the municipal corporation by which such policeman is employed at the time such command is obeyed." ILL. ANN. STAT., c. 24, §§ 1-15 (Smith-Hurd, 1942). This statute is in derogation of the general common law rule that no governmental entity is liable for injuries caused by its negligence or nonfeasance in the exercise of functions essentially governmental in character, as distinguished from proprietary functions, nor is it liable for the acts or omissions of its officers or agents through whom such functions are performed. *Gianfortone v. City of New Orleans*, 61 Fed. 64 (C. C. E. D. La. 1894); RESTATEMENT, TORTS § 887, comment c (1934).

The language of the Federal Tort Claims Act, 60 STAT. 842-47, 28 U. S. C. §§ 921-946 (1946), as amended by 61 STAT. 722 (1947), 28 U. S. C. § 931 (Supp. I 1946), was simplified when Title 28, U. S. C., "Judicial Code and Judiciary," was enacted into positive law as Title 28, U. S. C., "Judiciary and Judicial Procedure" (1948). § 2674 provides: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

One group of listed exceptions to the federal liability is: "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U. S. C. § 2680(h) (1948).

326. The most exhaustive and scholarly treatment of the common law of the subject is Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 673, 798 (1924).

327. Kauffman, *The Law of Arrest in Maryland*, 5 MD. L. REV. 125, 127 (1941).

(3) the request for assistance by an officer attempting to make an arrest. At the present time only the first of these is spoken of as a "warrant."<sup>328</sup> Anciently, however, all three came under that label. Lord Hale, for example, speaking in the seventeenth century, says that the oral order of a magistrate to arrest for a felony or a breach of the peace committed in his presence "is a good warrant without writing."<sup>329</sup> And he uses similar language with reference to the hue and cry.<sup>330</sup>

Today the oral order of a magistrate, or the oral request by an officer, however adequate it might be to authorize the arrest, would never be spoken of as "a warrant."<sup>331</sup> In the phrase "arrest without a warrant," however, the word carries its ancient significance, and means that the apprehension was not only without formal written process, but also did not have back of it any special authorization. While we speak in other terms we have in mind exactly the same situation as did Lord Hale when he spoke of such an arrest being made "ex officio, without any warrant."<sup>332</sup>

A single illustration will demonstrate the futility of attempting to force every arrest into one of two categories: (1) with a warrant, (2) without a warrant. Suppose a magistrate sees petty larceny committed and orders the thief arrested by an officer who was looking the other way and knows nothing about the offense except what the magistrate tells him. If this is an arrest without a warrant the officer does not have authority to make it because it is for a misdemeanor not committed in his presence (within the interpretation to be discussed presently). If it is with a warrant, the warrant must be shown (if there is no flight or resistance). The first is clearly contrary to the intent of the statute,<sup>333</sup> and the second is an utter impossibility. Confusion can be avoided only by recognizing the shift in the meaning of this word. An arrest under a proper oral order or request cannot be placed squarely within

328. "... the word 'warrant' includes only process issued by a lawfully appointed court, body or official." RESTATEMENT, TORTS § 122, comment *a* (1934).

329. 2 HALE P. C. \*86. He also says that a warrant issued by a justice may be "either in writing or *ore tenus*." 1 *id.* \*575.

330. "The hue and cry was good warrant in law for them to apprehend the offenders. . . ." 1 HALE P. C. \*465. The hue and cry was not identical with the officer's request for assistance and is mentioned here only to emphasize the breadth of Hale's use of the word "warrant." At a time when only a sheriff could summon a posse, any officer (or if no officer was available, any private person) could raise the hue and cry. 2 *id.* \*100. Any remaining vestige of the ancient hue and cry has no doubt now been merged with the officer's power to summon aid. For example: "In the very nature of things a call for assistance on the part of the sheriff or other officer cannot always be addressed with discrimination to specific individuals. The call generally comes when the sheriff is hard-pressed. It may be in the nature of a cry of despair or a bugle call to arms, calling upon all who may hear it, or be advised of it, to rally to the assistance of the officer endeavoring to serve legal process and thus maintain the majesty of the law." *Krueger v. State*, 171 Wis. 566, 583, 177 N. W. 917, 923 (1920); *Shawano County v. Industrial Comm.*, 219 Wis. 513, 519, 263 N. W. 590, 592 (1935).

331. "A warrant of arrest is an order, in writing, . . ." § 11521. "A warrant is a written order. . . ." RESTATEMENT, TORTS § 113 (1934).

332. 1 HALE P. C. \*587.

333. § 11535 is clearly intended to cover any public offense committed in the presence of a magistrate.

either of the categories named. Insofar as the law speaks of possession of the warrant, exhibition of the warrant, return of the warrant, or anything else in regard to the warrant itself, such an arrest is "without a warrant." For most other purposes it is "with a warrant."<sup>334</sup>

This suggests a type of arrest not mentioned up to this point. Sureties on a bail bond may exonerate themselves by surrendering the defendant at any time before forfeiture of the undertaking,<sup>335</sup> and for this purpose may arrest him on a certified copy of the undertaking, at any place in the state.<sup>336</sup> They are entitled to the aid of any sheriff in making the arrest within his county, and the sheriff also will act on the certified copy of the undertaking.<sup>337</sup> This certified copy is treated very much like a warrant<sup>338</sup> although it cannot actually qualify.<sup>339</sup> But since the arrest by or for the sureties is under this special authorization it is not controlled by the general provisions dealing with arrest without a warrant.

*The statutes.* This brings us to arrests "without a warrant" in this peculiar sense,—i.e., without any of the special types of authorization mentioned. The statutes are as follows: "An officer may, without a warrant, arrest a person:

334. It is significant that § 11535, giving a magistrate authority to give an oral order for the arrest of a person who commits an offense in his presence, immediately precedes the section authorizing an officer to arrest without a warrant. Had this been intended as an arrest "without a warrant" it would have been included as one of the subdivisions of § 11536 (and also of § 11541). Assistance rendered to an officer acting without a warrant is "without a warrant" for all purposes unless the officer leads the assister to believe that the officer has a warrant.

Because of the confusion resulting from use of the word "warrant" the arrest on the oral order of the magistrate is sometimes spoken of as an "arrest without a warrant." *Pritchett v. State*, 214 S. W. 2d 623, 627 (Tex. Cr. 1948). But it is not included in the phrase in this sentence: "An officer has no authority to arrest one without a warrant for the misdemeanor of unlawfully carrying a pistol, or for other misdemeanors, not committed in his presence, but the commission of which is communicated to him by others." *Hurd v. State*, 119 Tenn. 583 (headnote 1) (1907).

335. § 11683. The original theory of release on bail was the substitution of a private jailer for the public jailer. 4 BL. COMM. \*297. It was his responsibility to have the prisoner in court at the appointed time. He was not required to keep actual custody in the meantime, but was privileged at any time to rearrest the accused and redeliver him to the public jailer and thereby release himself from any further responsibility in this regard. RESTATEMENT, TORTS § 120(b) (1934).

336. § 11684. The same section provides that the sureties may, by a written authority indorsed on the certified copy of the undertaking, authorize another person to make the arrest.

337. § 11685.

338. If the sheriff makes the arrest he returns this copy, with his indorsement thereon, as he would if it were a *capias*. § 11686. No doubt provisions with reference to possession and exhibition of a warrant will be held to apply to this copy.

339. A warrant is an order in writing commanding the arrest of the accused. In its narrowest sense it is issued by a magistrate upon complaint. § 11521. In a broader sense it includes a *capias* issued by a clerk of the court either under court order, § 11712, or after indictment without court order if the defendant is not in custody or on bail. § 11609. But in all of these cases it is a written order commanding the arrest of the accused. "A warrant is a written order directing the arrest of a person, issued by a court, body or official, having authority to issue warrants." RESTATEMENT, TORTS § 113 (1934). The certified copy of a bail bond may be used as authority for an arrest but it is not a "warrant."

(1) For a public offense committed or a breach of the peace threatened in his presence.

(2) When the person has committed a felony, though not in his presence.

(3) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

(4) On a charge made, upon reasonable cause, of the commission of a felony by the person arrested."<sup>340</sup>

"A private person may arrest another: (1) For a public offense committed in his presence; (2) when the person arrested has committed a felony, although not in his presence; (3) when a felony has been committed and he has reasonable cause to believe that the person arrested committed it."<sup>341</sup>

To these must be added a section from another part of the code which makes it the duty of a peace officer to arrest one reasonably suspected of being armed with the intention of committing a breach of the peace.<sup>342</sup> And separate attention must be given to arrests,—(1) for a public offense committed in his presence, (2) for a threatened breach of the peace, (3) for a felony committed by the arrestee, (4) on reasonable suspicion of felony, (5) on charge of felony preferred by another, and (6) on official information.

### 1. For a Public Offense Committed in His Presence

The common law authorized either an officer or a private person to arrest for a felony or a breach of the peace committed in his presence,<sup>343</sup> the term "breach of the peace" being used here in its narrow sense of "a public offense done by violence or one causing or likely to cause an immediate disturbance of public order."<sup>344</sup> The statutes quoted have extended this

340. § 11536.

341. § 11541.

342. "It is the duty of all peace officers who know or have reason to suspect any person of being armed with the intention of committing a riot or affray, or of assaulting, wounding or killing another person, or of otherwise breaking the peace, to arrest such person forthwith, and take him before some justice of the peace." § 11424. "Such person so arrested shall be required to give bond in not less than two hundred and fifty dollars, nor more than two thousand dollars, with good security, to keep the peace; and, on his failing or refusing to give the required bail, he shall be committed to jail until bail is given, or he is otherwise discharged according to law." § 11425. "Any peace officer who knowingly fails or refuses to perform the duties required by the last two sections, is guilty of a misdemeanor in office." § 11426.

343. 4 BL. COMM. \*292; 9 HALSBURY, LAWS OF ENGLAND 85-88 (2d ed., Hailsham, 1933). There is some difference of opinion as to whether the common law authority of an officer went beyond this. A. L. I. CODE OF CRIMINAL PROCEDURE 231 (Official Draft with Commentaries, 1931). In speaking of the common law on this subject, treason is usually added to the statement because (for procedural purposes) it was kept in a separate category and not included within felony as it is today. Professor Wilgus, in his very scholarly analysis, has reached this conclusion: At common law either officer or private person was privileged to arrest without a warrant for treason, felony or breach of the peace committed in his presence, except that the arrest for breach of the peace was not privileged without a warrant unless it was effected while the breach was being committed or on immediate and continuous pursuit thereafter. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 673 (1924). Compare RESTATEMENT, TORTS §§ 119, 121 (1934).

344. RESTATEMENT, TORTS § 116 (1934).



authority to include any public offense committed in his presence, and this extension has been made not only to an officer but also to a private person.<sup>345</sup>

*Meaning of "presence."* The phrase "committed in his presence" is used in a rather artificial sense in the law of arrest. It does not mean "proximity." The offense need not be in the immediate neighborhood of the arrestee.<sup>346</sup> It may be committed at a considerable distance from him and yet be in his "presence" if he is able to see exactly what happens at the time, and for this reason the phrase sometimes used is "committed in his presence or within his view."<sup>347</sup> "According to the general rule recognized by numerous decisions, an offense is committed in the presence of the officer when he sees it with his eyes or sees some one or more of a series of continuous acts which constitute the offense."<sup>348</sup> While actually seeing the offense is sufficient for this purpose, it is not necessary. "Where an officer is apprised by any of his senses that a crime is being committed, it is being committed in his presence so as to justify an arrest without a warrant."<sup>349</sup> Thus it might be committed in the officer's presence because he was aware of it at the time by the sense of

345. §§ 11536, 11541. For the several different rules to be found under the statutes of the different states, see A. L. I. CODE OF CRIMINAL PROCEDURE 231-39 (Official Draft with Commentaries, 1931).

346. RESTATEMENT, TORTS § 119, comment *m* (1934).

347. *Gill v. State*, 134 Tex. Cr. 363, 364, 115 S. W. 2d 923, 924 (1938).

348. *State v. Lutz*, 85 W. Va. 330, 334, 101 S. E. 434, 439 (1919). And see *Cowan v. Commonwealth*, 215 S. W. 2d 989, 991 (Ky. 1948). Or if he sees part of the offense and is aided as to the rest by his other senses or by information. *State ex rel. Verdis v. Fidelity & C. Co. of N. Y.*, 120 W. Va. 593, 199 S. E. 884 (1938). A noticeable and identifiable bulge in clothing caused by a gun may be sufficient to constitute the commission of carrying a concealed weapon in the officer's presence. *Robinson v. Commonwealth*, 207 Ky. 53, 268 S. W. 840 (1925).

Sense perception may be interpreted in the light of existing circumstances. For example: Where an officer sees the accused enter a place of questionable reputation with a package partially concealed under his raincoat, and on the approach of the officer the accused jumps into an automobile and flees, and on being overtaken is found to have whiskey in broken jars in his possession, the officer is justified in arresting the accused without a warrant and the evidence thus obtained is admissible in evidence. *Farmer v. State*, 148 Tenn. 216, 254 S. W. 552 (1923). Concealment of a fruit jar while it is being carried into a building, in the vicinity of which there had been numerous complaints with respect to the unlawful transportation of whiskey, gave ground for the belief that it contained whiskey. *Suggs v. State*, 156 Tenn. 303, 300 S. W. 4 (1927). Seeing a man carrying bottles wrapped in a newspaper might not give an officer reasonable cause to believe he was carrying intoxicating liquor unlawfully, if it was on the street; but if he brings the package into a place so notorious for unlawful sale of liquors that a search warrant has been issued for its search, the officers have reasonable ground to believe he has unlawful possession of intoxicating liquor. *Garske v. United States*, 1 F. 2d 620 (8th Cir. 1924).

349. *Massa v. State*, 159 Tenn. 428, 430, 19 S. W. 2d 248 (1929); *McCanless v. Evans*, 177 Tenn. 86, 91, 146 S. W. 2d 354, 356 (1941). "This court has many times held that where an officer of the law has direct personal knowledge from one or more of his five senses of sight, hearing, smell, touch, or taste that the suspected person is committing a crime in his presence, he may lawfully arrest him." *Day v. United States*, 37 F. 2d 80, 81 (8th Cir. 1929).

One who is made aware of an emergency by any of his senses, and upon investigation finds an offense being committed, is privileged to arrest the offender. "A, while passing B's house, hears a woman's scream. He rushes into the house and discovers that the woman was screaming because B was beating her. A is privileged to arrest B." RESTATEMENT, TORTS § 119, illustration 3 (1934).

hearing,<sup>350</sup> of smell,<sup>351</sup> of touch,<sup>352</sup> or of taste.<sup>353</sup> It has also been held to be committed in the officer's presence if the offender confesses to the officer while he is still continuing with his offense.<sup>354</sup>

At the other extreme, an offense may be committed under one's very nose, so to speak, without being committed in his presence, if the facts constituting the crime are not brought to his attention.<sup>355</sup> Whatever the proximity may be, an offense is not committed in an officer's presence if his senses afford him no knowledge of the crime.<sup>356</sup> Liquor may be transported unlawfully in a car driven past an officer without the offense being committed in his presence if the liquor "was not evident to the officer."<sup>357</sup> And no degree of proximity will be sufficient to bring the offense of carrying a concealed weapon within the category "committed in his presence" if the fact is unknown to him.<sup>358</sup> The fact that it develops after an invalid arrest that the arrestee was carrying a concealed weapon unlawfully does not justify the arrest,<sup>359</sup>—

350. The following cases held that the offenses were committed in the officers' presence: The offense of conducting a disorderly house was detected by what an officer heard from the outside. *Hawkins v. Lutton*, 95 Wis. 492, 70 N. W. 483 (1897). A man on a public road struck his wife a blow with a stick and an officer about forty feet away heard the blow and the cries of the woman although he could not see the attack because of darkness. *State v. McAfee*, 107 N. C. 812, 12 S. E. 435 (1890). Officers on the street heard the cries of a woman being beaten in the house. *Dilger v. Commonwealth*, 88 Ky. 550, 11 S. W. 651 (1889). An officer heard a pistol shot within a hundred yards but could not see the assault because of an intervening shed. *Carlton v. State*, 63 Fla. 1, 58 So. 486 (1912). A policeman heard a shot fired two blocks away and immediately heard footsteps and saw a man running. *Brooks v. State*, 114 Ga. 6, 39 S. E. 877 (1901).

351. *Cope v. State*, 157 Tenn. 199, 7 S. W. 2d 805 (1928); *State v. Rhodes*, 316 Mo. 571, 292 S. W. 78 (1927). "Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. . . . I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as to that of sight." *United States v. Borkowski*, 268 Fed. 408, 412 (S. D. Ohio 1920); *McBride v. United States*, 284 Fed. 416 (5th Cir. 1922); cf. *People v. Flaczinski*, 223 Mich. 650, 194 N. W. 566 (1923).

352. See *Day v. United States*, 37 F. 2d 80, 81 (8th Cir. 1929). For example, an offender carrying a concealed weapon might brush against an officer in a crowd in such a manner that the officer could feel the weapon and know it to be such.

353. *Ibid.* For example, an officer who is served an intoxicating drink from a punch bowl, where only non-intoxicating beverages could lawfully be served.

354. *Patterson v. Commonwealth*, 206 Ky. 258, 267 S. W. 160 (1924); *Blager v. State*, 162 Md. 664, 161 Atl. 1 (1932). For a discussion of the *Blager* case see Kauffman, *The Law of Arrest in Maryland*, 5 Md. L. Rev. 125, 162-64 (1941). But confession to the officer after the offense is at an end does not satisfy the requirement of an offense committed in his presence. *Cowan v. Commonwealth*, 215 S. W. 2d 989 (Ky. 1948).

355. *Haltom v. State*, 58 Okla. Cr. 117, 50 P. 2d 744 (1935); RESTATEMENT, TORTS § 119, comment *m* (1934).

356. *Jones v. State*, 202 P. 2d 228 (Okla. Cr. 1949); see *Garske v. United States*, 1 F. 2d 620, 623 (8th Cir. 1924).

357. *Hughes v. State*, 145 Tenn. 544, 571, 238 S. W. 588, 596 (1921); cf. *Love v. Bass*, 145 Tenn. 522, 238 S. W. 94 (1921).

358. *Hurd v. State*, 119 Tenn. 583, 108 S. W. 1064 (1907); *Pesterfield v. Vickers*, 43 Tenn. 205 (1866). "Even if the person arrested did in fact have a pistol concealed about his person, the fact not being discoverable without a search, the offense of thus carrying it was not, in legal contemplation, committed in the presence of the officer." *Roberson v. State*, 43 Fla. 156, 166, 29 So. 535, 538 (1901); *Pickett v. State*, 99 Ga. 12, 15, 25 S. E. 608, 609 (1896).

359. *People v. Henneman*, 373 Ill. 603, 27 N. E. 2d 448 (1940); *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434 (1919). The Uniform Pistol Act, § 4, legalizes the arrest of any person illegally carrying a pistol, whether or not the officer had reasonable

even (it has been held) if the officer is shot with that very firearm.<sup>360</sup> This latter point, however, must be considered also in connection with a threatened breach of the peace which will be discussed presently.

Loud talking in the house which is heard by officers in passing is not the commission of an offense in their presence if they are unable to understand a word of what is said and there is no indication that the inmates are intoxicated or disorderly.<sup>361</sup>

*Mistake of fact.* If the one arrested, although not actually committing an offense, is reasonably believed to be doing so and this belief is based upon appearances at the moment, the arrest is privileged,—at least if made by an officer<sup>362</sup> and the misleading appearances are caused by the arrestee himself.<sup>363</sup> Since an officer has a duty<sup>364</sup> as well as a privilege to arrest for a public offense committed in his presence he should be fully protected in acting upon the reasonable appearances at the moment whether the mistake is caused by the conduct of the arrestee or by something else, and this is the accepted view.<sup>365</sup>

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cause for believing him guilty. This Act has not been adopted in Tennessee as of April 1, 1949.

360. *Hurd v. State*, 119 Tenn. 583, 108 S. W. 1064 (1907); *Roberson v. State*, 43 Fla. 156, 29 So. 535 (1901). But if the arrest was lawful, although for a different offense, the prisoner may be convicted of carrying a concealed weapon the presence of which was unknown to the officer at the time. *Goodwin v. State*, 148 Tenn. 682, 257 S. W. 79 (1923).

361. *Lucarini v. State*, 159 Tenn. 373, 19 S. W. 2d 239 (1929). Evidence showed that the officer saw several men on the ground and heard the snapping of fingers. He saw no money or gambling device and there was no evidence that the snapping of fingers is an incident of, or usually occurs in, gambling. It was held that the offense was not committed in the presence of the officer. *Hall v. State ex rel. Norman*, 10 Tenn. App. 287 (E. S. 1929).

362. In arrest on suspicion of felony the court has held that a private person acts at his peril and must show that the offense for which the arrest was made had actually been committed. *Martin v. Castner-Knott Dry Goods Co.*, 27 Tenn. App. 421, 181 S. W. 2d 638 (M. S. 1944). On analogy the court might hold that a private person arresting for an offense committed in his presence would not be protected by the mistake of fact doctrine if no offense was in fact committed. *Lindquist v. Friedman's, Inc.*, 366 Ill. 232, 8 N. E. 2d 625 (1937). See RESTATEMENT, TORTS § 119, illustration 3 (1934).

"Reasonable grounds justified the arrest, whether the facts when developed would be sufficient to convict or not." *Wilson v. State*, 79 Tenn. 310, 314 (1883). This was said of an arrest by a private person, but there was no doubt of a felony having been committed in this case; if there had been any doubt it would have been only as to the guilt of the person arrested.

363. *Goodwin v. State*, 148 Tenn. 682, 257 S. W. 79 (1923); *St. Louis I. M. & S. Ry. v. Hudson*, 95 Ark. 506, 130 S. W. 534 (1910); *Easton v. Commonwealth*, 26 Ky. L. Rep. 960, 82 S. W. 996 (1904); *Commonwealth v. Cheney*, 141 Mass. 102, 6 N. E. 724 (1886). But see *Edgin v. Talley*, 169 Ark. 662, 276 S. W. 591 (1925).

"Although a man be in fact sober, if he so conducts himself in public as to justify the impression that he is drunk, whether he does so purposely or otherwise, he subjects himself to arrest, and the arrest is lawful." *Kelley v. State*, 184 Tenn. 143, 149, 197 S. W. 2d 545, 547 (1946). *Goodwin v. State*, 148 Tenn. 682, 686, 257 S. W. 79, 80 (1923). See also *Dittberner v. State*, 155 Tenn. 102, 107, 291 S. W. 839, 840 (1927); *Ball v. State*, 36 So. 2d 159 (Miss. 1948). One authority has limited the protection afforded private persons in such cases to mistakes based on the wilful conduct by the arrestee. The phrase used is "knowingly causes." RESTATEMENT, TORTS §§ 119(c), 121 (1934).

364. *State ex rel. Thompson v. Reichman*, 135 Tenn. 653, 188 S. W. 255 (1916); see *Thompson v. State*, 185 Tenn. 73, 75, 203 S. W. 2d 361, 362 (1947).

365. In *Terry v. Burford*, 131 Tenn. 451, 175 S. W. 538 (1915), it was held that an

*Provoked by an officer.* "A peace officer cannot legally make an arrest without a warrant for an offense claimed to have been made in his presence which he himself provokes or brings about."<sup>366</sup> In one case, for example, an officer without lawful reason or authority annoyed a girl (who was a stranger to him) until she slapped his face. He then arrested her for this "offense" and was held to be liable for wrongful arrest.<sup>367</sup> On the other hand, an officer attempting to make an authorized arrest in a lawful manner is in no sense "provoking a difficulty."<sup>368</sup>

*Attempt.*<sup>369</sup> At common law either an officer or a private person is privileged to arrest for a felony attempted in his presence, if the arrest is made at once or in fresh pursuit.<sup>370</sup> Modern statutes intended to enlarge the authority to arrest have sometimes been worded in this form: "For a public offense committed or attempted in his presence."<sup>371</sup> This is unnecessary because an attempt to commit an offense is in itself a punishable offense<sup>372</sup>

officer is authorized to arrest if he believes, on reasonable grounds, that the arrestee is about to commit a breach of the peace in his presence, although this is a mistake not caused by the arrestee. "A peace officer making an arrest without a warrant is protected in every case where he acts under a reasonable mistake as to the existence of facts which . . . justify an arrest without a warrant." RESTATEMENT, TORTS § 121, comment i (1934). "In passing upon the right of an officer to make an arrest of one who is in possession of a pistol on the public street of a city, where the possession of a pistol makes a prima facie case, the possession in the presence of an officer determines the right of the officer to make an arrest, even though upon the trial of the case the accused might present a legal defense." *Reed v. State*, 195 Ga. 842, 25 S. E. 2d 692, 698 (1943). "We therefore conclude that . . . the act of fishing was committed by plaintiff (who admitted that he had no license) in the presence of defendants and that they were not required to know that the admitted fishing was done at a place or under circumstances where a license was not required under some exemption contained in the statute," and hence were authorized to arrest the plaintiff without a warrant. *Giannini v. Garland*, 296 Ky. 361, 177 S. W. 2d 133, 136 (1944).

There is some authority for the view that an officer purporting to arrest for an offense committed in his presence must show that such offense was *in fact* committed. See *Snyder v. Thompson*, 134 Iowa 725, 728, 112 N. W. 239, 240 (1907); *Stearns v. Titus*, 193 N. Y. 272, 274-75, 85 N. E. 1077, 1078 (1908).

366. *Scott v. Feilschmidt*, 191 Iowa 347, 351, 182 N. W. 382, 384 (1921); *accord*, *Pavish v. Meyers*, 129 Wash. 605, 225 Pac. 633 (1924); *cf.* *Pinkerton v. Verberg*, 78 Mich. 573, 44 N. W. 579 (1889).

367. *Scott v. Feilschmidt*, 191 Iowa 347, 182 N. W. 382 (1921).

368. See *Hickman v. Durham*, 213 S. W. 2d 569, 570 (Tex. Civ. App. 1948). "But the law does not allow that a lawful arrest is a provocation to passion and heat of blood." *Galvin v. State*, 46 Tenn. 283, 292 (1869).

369. "An attempt in criminal law is an apparent unfinished crime, and hence is compounded of two elements, viz.: (1) The intent to commit a crime; and (2) a direct act done towards its commission, but falling short of the execution of the ultimate design." *Glover v. Commonwealth*, 86 Va. 382, 387, 10 S. E. 420, 421 (1889). Quoted with approval in *McEwing v. State*, 134 Tenn. 649, 654, 185 S. W. 688, 689 (1916).

370. RESTATEMENT, TORTS §§ 119(d), 121(a) (1934).

371. IOWA CODE, §§ 755.4, 755.5 (1946).

372. "It is broadly stated by numerous authorities that every attempt to commit a felony or a misdemeanor, whether the attempted offense be such at common law or by statute, is itself a misdemeanor at common law." *Thompson v. State*, 105 Tenn. 177, 182, 58 S. W. 213, 214 (1900). And see 1 BURDICK, THE LAW OF CRIME § 135 (1946); CLARK & MARSHALL, LAW OF CRIMES § 114 (4th ed., Kearney, 1940). The early Tennessee cases held that only attempts to commit offenses against the person were punishable. These cases were reviewed and overruled in *Hayes v. State*, 83 Tenn. 64 (1885). The position there taken was followed in *Clark v. State*, 86 Tenn. 511, 8 S. W. 145 (1888); *Rafferty v. State*, 91 Tenn. 655, 16 S. W. 728 (1891).

(unless the act attempted is not a true crime but a so-called "civil offense").<sup>373</sup> Hence the authority given by statute to arrest for "a public offense committed in his presence"<sup>374</sup> is sufficient to authorize arrest for an attempt committed in his presence (unless the attempt is of a so-called "civil offense,"—in which case no arrest is proper since what was done is not punishable).<sup>375</sup>

## 2. For a Threatened Breach of the Peace

The statute authorizes an officer to arrest for "a breach of the peace threatened in his presence."<sup>376</sup> The court has not limited the interpretation of "breach of the peace," as here used, to its narrow sense of an offense causing or likely to cause an immediate public disorder, but has taken the position, for example, that it is a breach of the peace, within the meaning of this clause, for one having intoxicating liquors to prepare for an unlawful sale thereof,<sup>377</sup> or to transport them illegally.<sup>378</sup> The court has indicated, moreover, that an officer may arrest for a "breach of the peace threatened in his presence," although he was not made cognizant of the fact through his senses.<sup>379</sup>

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373. "It has been held that the rule that an attempt to commit a misdemeanor is a misdemeanor does not apply to statutory misdemeanors that are merely *mala prohibita*, . . ." CLARK & MARSHALL, LAW OF CRIMES § 114 (4th ed., Kearney, 1940). The syllabus of one case says: "A mere attempt to commit a statutory misdemeanor is not indictable." *Whitesides v. State*, 79 Tenn. 474 (1883). But the offense in this case was selling cotton in the seed between sunset and sunrise, which is clearly *malum prohibitum* and not *malum in se*. This offense was of the type coming to be recognized as a "civil offense." See Gausewitz, *Reclassification of Certain Offenses as Civil Instead of Criminal*, 12 WIS. L. REV. 365 (1937); Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933).

374. §§ 11536, 11541.

375. *Whitesides v. State*, 79 Tenn. 474 (1883). A motorist, for example, who has not parked overtime in a restricted zone should not be punished on the theory that he attempted to do so. On the other hand it is quite proper to punish one for an attempt to commit larceny. *Bird v. Key*, 67 Tenn. 401 (1875).

376. § 11536. The corresponding section gives no such authority to a private person. § 11541. And the court has indicated that the private person has no authority to arrest "without a warrant" other than that granted in this section. *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906).

377. *State ex rel. Thompson v. Reichman*, 135 Tenn. 653, 188 S. W. 225 (1916), rehearing dismissed, 135 Tenn. 685, 188 S. W. 597 (1916). And see *Love v. Bass*, 145 Tenn. 522, 238 S. W. 94 (1921).

378. *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588 (1922). It is by no means clear why "breach of the peace" is given a broad rather than a narrow interpretation as it is used in this statute, because it customarily was used in the narrow sense with reference to the common law authority to arrest. For example, "different rules apply to arrests for breaches of the peace, than do in arrests for other misdemeanors." Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 573 (1924). Furthermore, if the intent was to include any public offense threatened in his presence it would have been simpler to say: "For a public offense committed or threatened in his presence." The statute reads: "For a public offense committed or a breach of the peace threatened in his presence." § 11536(1). On the other hand it is desirable for officers to have authority to arrest for any public offense threatened in their presence and "breach of the peace" is often used broadly enough to include any indictable offense. See, for example, *Rex v. Jones*, 2 Strange 1146, 93 Eng. Rep. 1091 (K. B. 1740). Hence this interpretation is not likely to be disturbed.

379. *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588 (1922). "If, on reasonable grounds, he believed that Burford was about to commit a breach of the peace (and such would have been an attack on Mr. Cole's home), he had the lawful right to arrest Bur-

*Armed with intent.* The arrest of one who is armed with intent to commit a breach of the peace is governed by a different section. "It is the duty of all peace officers who know or have reason to suspect any person of being armed with the intention of committing a riot or affray, or of assaulting, wounding, or killing another person, or of otherwise breaking the peace, to arrest such person forthwith, and take him before some justice of the peace."<sup>380</sup> This is not limited to carrying *concealed* weapons, nor in fact is the statute which

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ford." *Terry v. Burford*, 131 Tenn. 451, 464-65, 175 S. W. 538, 541 (1914). But if the officer had reason so to believe in this case it was because of what he had seen.

It is not clear why the word "presence" as used in this statute (§ 11536) means consciousness through the senses as applied to a public offense committed, but means something other than this as applied to a breach of the peace threatened. It is quite true as pointed out in the *Reichman* case that an officer having authority to arrest for an illegal sale of liquor threatened in his presence could arrest without actually having seen a sale. *State ex rel. Thompson v. Reichman*, 135 Tenn. 653, 188 S. W. 225 (1916), *pet. reh. dismissed*, 135 Tenn. 685, 188 S. W. 597 (1916). But it would seem necessary for the officer to be cognizant of the facts constituting the threat, and to be so cognizant through his senses in order for the threat to be in his "presence." When the court has occasion to re-examine this problem it may find ground for upholding the *Hughes* case without undertaking to support everything said in the opinion. The conviction was for the crime of unlawful receipt, possession and transportation of intoxicating liquors. It was not a crime which was merely threatened at the time of arrest; it had been committed and was being committed. The officer had information that Hughes was engaged in the unlawful sale of intoxicating liquor. He saw him leave his car by the side of the road and return with a keg having the appearance of a nail keg although there was no store or other place there where nails were likely to be obtained. He saw Hughes get in his car and drive away. The court said: "These circumstances justified the officer in believing that a violation of the law was about to be committed." 135 Tenn. at 572, 238 S. W. at 596. He was equally justified in believing that the offense was being committed before his very eyes. The *Hughes* case may come to stand for the rule that facts coming within the sphere of sense perception may be interpreted in the light of other information possessed by the officer, whether it is a case of a breach of the peace threatened or an offense committed. This would be quite sound. "If the actor, by the use of any of his senses, perceives that an act is being done, and forthwith investigates and finds that the act constitutes a breach of the peace, he is privileged to arrest under the statement in Clause (c)." RESTATEMENT, TORTS § 119, comment *m* (1934). And clause (c) reads: "If the other, in the presence of the actor, is committing a breach of the peace or, having so committed a breach of the peace, he is reasonably believed by the actor to be about to renew it, . . ." *Id.* § 119(c). *Cf. Suggs v. State*, 156 Tenn. 303, 300 S. W. 4 (1927); *Farmer v. State*, 148 Tenn. 216, 254 S. W. 552 (1923).

The *Hurd* case, mentioned *infra* note 382, is entitled to attention on this point. That case was considered only under what is now § 11536 because what is now § 11424 was not called to the attention of the court. The arrest was for carrying a concealed weapon. A person who had seen the pistol just a few moments previously told the officer that Hurd had it. Hence the officer had reason to believe that the offense of carrying a concealed weapon was being committed, and also that it was "threatened" in the sense that unlawful transportation of liquor was "threatened" in the *Hughes* case. But there is this important difference between the two: in the *Hughes* case the officer saw things which confirmed the tip-off he had received; in the *Hurd* case this was not the fact.

Officers were told that a certain liquor store was selling liquor to certain persons who sold it in dry territories. They went to the vicinity of this store and saw Chaplin and another drive a taxicab around to the back of the store. They saw sacks being loaded into the car and could hear that they contained bottles. They inquired and learned that the store sold nothing but liquor and wine. The officers followed the taxicab into local option territory and there stopped it. As they approached the taxicab they could see that it contained whiskey. It was held error to exclude this evidence because an offense was committed in the presence of the officers. *Commonwealth v. Chaplin*, 307 Ky. 630, 211 S. W. 2d 841 (1948).

380. § 11424. Knowingly failing or refusing to make such an arrest constitutes a misdemeanor in office. § 11426.

forbids the carrying of dangerous weapons.<sup>381</sup> It would cover such a case, however. And any officer who was told of such a weapon being carried with intent to commit a breach of the peace (in the narrow sense), and received such information from a credible source, would be privileged to hunt up the offender and arrest him even if no sign of the weapon could be observed by the officer prior to the arrest. It was indicated in the *Hurd* case that an officer would have no authority to arrest for this offense under these circumstances, but not all of these facts were shown and this section had not been called to the attention of the court.<sup>382</sup>

Except for the special authority of an officer to apprehend one reasonably believed to be *armed with intent*, or one who threatens a breach of the peace in his presence, no one is privileged to arrest without a warrant on a misdemeanor charge unless the offense was committed in his presence,<sup>383</sup>—keeping always in mind that “arrest without a warrant,” as so used, means without any (1) formal written process, (2) order of a magistrate to arrest for an offense committed in his presence, (3) request by an officer for assistance in making an arrest being attempted by him, or (4) (in case of an arrest of one at liberty on bail) certified copy of the undertaking.

The authority in felony cases is much broader.<sup>384</sup>

### 3. For a Felony Committed by Arrestee

Either an officer or a private person is privileged to arrest: “When the

381. § 11007; *Grindstaff v. State*, 172 Tenn. 77, 110 S. W. 2d 309 (1937).

382. *Hurd v. State*, 119 Tenn. 583, 108 S. W. 1064 (1907). While the officer had been told that Hurd had a gun it is not clear that he had reason to believe Hurd intended to commit a breach of the peace with it, although this may well have been the fact. In any event the jury had not been instructed properly by the trial judge and the reversal of the judgment was necessary. The language used in the opinion, however, would have been quite different if § 11424 had been called to the attention of the court. The case has been cited as authority for the following point: “Officer has no authority to arrest one for the misdemeanor of unlawfully carrying a pistol or for other misdemeanors, not committed in his presence, but the commission of which is communicated to him by others unless he has a warrant.” See annotations to § 11536.

383. *Robertson v. State*, 184 Tenn. 277, 198 S. W. 2d 633 (1947); *Hurd v. State*, 119 Tenn. 583, 108 S. W. 1064 (1907); *State ex rel. Key v. Cron*, 12 Tenn. App. 615 (M. S. 1931); cf. § 3564. The common law did not authorize anyone to arrest for a misdemeanor not committed in the presence of the arrestee. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 673-74 (1924). “Regarding the right of a private person to arrest without a warrant for a misdemeanor there seems to be no exception in this country to the rule that he may not arrest for a misdemeanor not committed in his presence.” A. L. I. CODE OF CRIMINAL PROCEDURE 238 (Official Draft with Commentaries, 1931). There are a few statutes authorizing an officer to make such an arrest when he has reasonable ground to believe the arrestee guilty. See IOWA CODE § 755.4 (1946); ILL. ANN. STAT., c. 38, § 657 (Smith-Hurd, 1935). Officers feel that they should not arrest without a warrant in these cases even though it is authorized by the statute. Warner, *Investigating the Law of Arrest*, 31 J. CRIM. L. & CRIMINOLOGY 111, 117 (1940).

384. “The distinction must be recognized between the authority of a peace officer to arrest without a warrant for a felony on the one hand and a misdemeanor on the other.” *Thompson v. State*, 185 Tenn. 73, 74, 203 S. W. 2d 361 (1947). The court might have added a private person also, although his authority is not as broad as that of the officer.

person has committed a felony, though not in his presence."<sup>385</sup> This very important provision seems to have been overlooked entirely. In cases in which it should have received the chief emphasis it seems not to have been brought to the attention of the court.<sup>386</sup> And a writer<sup>387</sup> urging the need of such a statutory provision seems unaware of the fact that it is a mere codification of the common law.<sup>388</sup>

One who has arrested the wrong person may be able to give an acceptable explanation of his mistake; but he certainly should be called upon to explain. It does not make sense, however, to require one to explain how he happened to arrest the *right* person. The reason back of the rule, that the arrest of the guilty felon is privileged, is not based on a desire to protect one who has happened to make a lucky guess. It goes far beyond that. One who is experienced in the practical problems of law enforcement, but perhaps has had inadequate training in the art of self-expression, finds it difficult to convey his ideas on this subject to judge and jury who seldom have had any actual experience in the apprehension of wrongdoers. As stated by one authority, the officer "is unable to paint a word picture of the considerations which led him to guess the guilt of the man he arrested, that will enable the judge to

385. §§ 11536, 11541 (in the latter section the word is "although").

386. For example, *Epps v. State*, 185 Tenn. 226, 205 S. W. 2d 4 (1947). Epps was guilty of the very felony for which he was arrested,—unlawful transportation of liquor. It was not committed in the officer's presence, as the court points out. Hence it was an arrest for a felony not committed in the officer's presence and is squarely within the language of § 11536(2). Compare *Wilson v. State*, 79 Tenn. 310 (1883), in which the court emphasizes that the stolen property was found in possession of one arrested for larceny. In *Smith v. State*, 169 Tenn. 633, 90 S. W. 2d 523 (1936), the officer arrested the felon for the very felony he was committing at the time (not in the officer's presence) and the whole argument was whether the charge of felony preferred by a third person was "upon reasonable cause." "When the person arrested has committed a felony, though not in his presence" was not mentioned. In other cases great care has been taken to show that the arrest was on "reasonable suspicion of felony" when no more was needed than to point out that the arrestee was actually guilty of the felony for which he was arrested. *Jones v. State*, 161 Tenn. 370, 33 S. W. 2d 59 (1930); *Stone v. State*, 161 Tenn. 290, 30 S. W. 2d 247 (1930).

387. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 333 (1942).

388. "If, however, he arrests another for a particular felony and the other has actually committed that felony, it is immaterial that his suspicion is based upon grounds which would not be sufficient to create suspicion in the minds of reasonable men." RESTATEMENT, TORTS § 119, comment *g* (1934). "2. The sheriff, and, 3. The coroner, may apprehend any felon within the county without warrant." 4 BL. COMM. \*292. "As to the second case, viz. where a felony is committed by B but A that arrests him, doth not certainly know it, as not being present at the committing of it. I take the law to be all one with the former case, only what he doth herein, he doth at his peril; for if in truth B be a felon, then A may arrest him, . . ." 2 HALE P. C. \*78. Hale's discussion makes clear that the arrester is fully protected if he arrests the actual felon and that it is only when he arrests one not guilty of felony that there must be "reasonable causes of such suspicion." *Id.* at \*78. He repeats that officers may "arrest felons and those that are probably suspected of felonies." *Id.* at \*85.

The Missouri court, speaking of an arrest by an officer without a warrant, said: "He is not necessarily justified because he believes an offense has been committed, but he is always justified if an offense in fact has been committed, whether he had reason to believe it or not. If a crime has *not* been committed, then he can only be justified by the existence of reasonable ground to believe that it has been committed." *State v. Williams*, 328 Mo. 627, 14 S. W. 2d 434, 435-36 (1929).



realize that he would have done the same thing had he been in the officer's place." 389

An officer who deprives a person of his liberty on a general "fishing expedition," and with no specific offense in mind, has made an unlawful arrest even if the prisoner happens to have committed some unknown felony.<sup>390</sup> But an officer who makes an arrest for murder, and takes into custody the actual murderer, should not even be required to explain why he decided the arrestee was in fact the guilty man. A special clause in the statute was inserted for this very purpose.<sup>391</sup>

#### 4. On Reasonable Suspicion of Felony

The accepted view of the common law is that either an officer or a private person is privileged, without a warrant, to arrest one who is reasonably believed to be guilty of felony, with one important distinction: the officer is protected if he believes, upon reasonable grounds (1) that a felony has been committed and (2) that the arrestee is the guilty person; whereas for the protection of a private person it is necessary (1) that a felony has in fact been committed and (2) that he has reasonable grounds for believing the arrestee guilty of committing it.<sup>392</sup>

This distinction is not found in the wording of the statutes<sup>393</sup> but as they

389. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 333 (1942).

390. *Robertson v. State*, 184 Tenn. 277, 198 S. W. 2d 633 (1947).

391: § 11536(2). A similar clause in another section legalizes such an arrest by a private person. § 11541(2). As Professor Waite points out, this authorizes the arrest: "Where a felony has in truth been committed by the person arrested, whether or not the officer has reasonable ground to believe so." Waite, *Some Inadequacies in the Law of Arrest*, 29 MICH. L. REV. 448, 458 (1931).

392. *Holley v. Mix*, 3 Wend. 350, 353 (N. Y. 1829); *Beckwith v. Philby*, 6 B. & C. 635, 638-39, 108 Eng. Rep. 585, 586 (K. B. 1827); *Walters v. W. H. Smith & Son, Ltd.*, [1914] 1 K. B. 595 (1913); 1 STEPHEN, HISTORY OF THE CRIMINAL LAW 193 (1883); 9 HALSBURY, LAWS OF ENGLAND 84-87 (2d ed., Hailsham, 1933); A. L. I. CODE OF CRIMINAL PROCEDURE, 236-40 (Official Draft with Commentaries, 1931); RESTATEMENT, TORTS §§ 119, 121 (1934); Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 673-74 (1924). Professor Jerome Hall has taken the position that the common law, prior to the Revolution, required an actual felony plus reasonable cause to believe the arrestee guilty thereof, to authorize an arrest without a warrant by an officer, as well as by a private person. Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566 (1936). Without doubt the generalizations of the early writers lend support to this theory; but Professor Hall was unable to produce any early case in which an officer, having made an arrest on reasonable grounds for believing the arrestee guilty of felony, was held to have acted unlawfully because no felony had in fact been committed. Probably the most that can be said is that some of the early writers were thinking in terms of this requirement, but that when the point was actually raised in the cases it was held that a peace officer is not required to act at his peril on the question whether a felony has in fact been committed or not.

393. "An officer may, without a warrant, arrest a person. . . . (3) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. . . ." § 11536. "A private person may arrest another. . . . (3) When a felony has been committed, and he has reasonable cause to believe that the person arrested committed it." § 11541. It will be noted that as between the two clauses the limitation seems to be stated more positively in the case of an officer than in referring to a private person. There is no indication anywhere, however, of an intent to narrow the common law authority of an officer to arrest without a warrant, and this authority has been preserved in full by the court's interpretation.

were intended as a codification of the common law upon this point<sup>394</sup> it seems to remain unchanged.<sup>395</sup> For years the court has repeated that "an officer may lawfully proceed to arrest without a warrant any person when the officer has, with reasonable cause, been led to believe that the person has committed, is committing, or is about to commit a felony."<sup>396</sup>

The General Assembly has accepted this interpretation and has given convincing evidence that it would have amended the section if it had been interpreted to require an officer arresting for felony, without a warrant, to act at his peril on the question of whether a felony had in fact been committed. This is found in the Fresh Pursuit Act. This statute<sup>397</sup> authorizes peace officers of other states, in fresh pursuit of one wanted for felony, to cross our boundary and make the arrest here. It gives a foreign officer on such pursuit "the same authority to arrest and hold such person in custody, as has any member of any duly authorized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state"<sup>398</sup> and expressly adds that this includes "a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed."<sup>399</sup>

A private person, under the statute as at common law, must show that a felony has actually been committed by someone, and that he had reasonable ground to believe the person arrested was the felon.<sup>400</sup>

To summarize: If an innocent person is arrested, in a proper manner, by one who believed him guilty of felony and had reasonable grounds for such belief, the arrest is privileged if made by an officer, but is not privileged if made by a private person unless such a felony actually had been committed by someone. The reason for the difference is that whenever a peace officer is authorized to make an arrest he has also a duty to do so if the apprehension

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394. § 11536 is an "embodiment of the common law." *Tenpenny v. State*, 151 Tenn. 669, 673, 270 S. W. 989, 990 (1924).

395. *Cf. Fry v. Hudspeth*, 165 Kan. 674, 197 P. 2d 945 (1948).

396. *Howard Martin v. State*, unreported but quoted in *Dittberner v. State*, 155 Tenn. 102, 105-6, 291 S. W. 839, 840 (1927); *Jones v. State*, 161 Tenn. 370, 373, 33 S. W. 2d 59, 60 (1930); *Vaughn v. State*, 178 Tenn. 384, 386, 158 S. W. 2d 715, 716 (1942); *Thompson v. State*, 185 Tenn. 73, 75, 203 S. W. 2d 361 (1947). In an earlier case the court had said, "we understand the law to be well settled, that a *peace officer* may make an arrest on a charge of felony, upon a reasonable cause of suspicion, without a warrant, although it should afterwards turn out that no felony had, in fact, been committed." *Lewis v. State*, 40 Tenn. 127, 146 (1859). (*Italics added.*)

397. § 11546.1-11546.8.

398. § 11546.1.

399. § 11546.5.

400. *Martin v. Castner-Knott Dry Goods Co.*, 27 Tenn. App. 421, 181 S. W. 2d 638 (M. S. 1944); *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906).

is reasonably possible,<sup>401</sup> whereas a private person has no *duty* to make an arrest when acting solely upon his own initiative.<sup>402</sup>

*Reasonable suspicion (or probable cause).* Mere suspicion alone is never sufficient to authorize even a peace officer to arrest an innocent person without a warrant.<sup>403</sup> It must be a *reasonable suspicion*,—that is, a suspicion based upon grounds sufficient to induce a reasonably prudent man to believe the arrestee guilty of the crime for which the arrest is made<sup>404</sup> or to cause him to believe there is likelihood of such guilt. The latter qualification is sufficient to permit an officer to arrest two persons, for example, if he has reason to believe a felony has been committed by one or the other.<sup>405</sup> "It is impossible to define 'reasonable cause' in terms to fit all cases arising. Each case must stand on its own facts. A narrow construction would open the way for the escape of desperate criminals and the defeat of justice. One too liberal would lead to the harassment of the innocent. But the officer may not be required to wait for assurance, for evidence which would convict; when circumstances fairly point to a felony it is his duty to act, and act promptly."<sup>406</sup>

Since a warrant of arrest is to be issued only upon probable cause, an officer (or even a private person) who knows a warrant has been issued for the

401. *State ex rel. Thompson v. Reichman*, 135 Tenn. 653, 188 S. W. 225 (1916); RESTATEMENT, TORTS § 121, comment *g* (1934). "And these are under a greater protection of the law. . . . Because they are by law punishable, if they neglect their duty in it." 2 HALE P. C. \*85.

402. See *McCrackin v. State*, 150 Ga. 718, 722, 105 S. E. 487, 489 (1920).

403. *People v. Chatman*, 322 Ill. App. 519, 54 N. E. 2d 631 (1944); *People v. Guertins*, 224 Mich. 8, 194 N. W. 561 (1923); *State ex rel. Wong You v. District Court*, 106 Mont. 347, 78 P. 2d 353 (1938); *Gill v. State*, 134 Tex. Cr. 363, 115 S. W. 2d 923 (1938); *Gonzales v. State*, 131 Tex. Cr. 15, 95 S. W. 2d 972 (1936).

404. *Welch v. State*, 30 Okla. Cr. 330, 236 Pac. 68 (1925); *Maghan v. Jerome*, 88 F. 2d 1001 (D. C. Cir. 1937).

405. This likelihood is sufficient for "reasonable suspicion" because "the public interest in the punishment of a felon requires the other's arrest for the purpose of securing his custody pending investigation." RESTATEMENT, TORTS § 119, comment *j* (1934).

406. *Howard Martin v. State*, unreported but quoted in *Dittberner v. State*, 155 Tenn. 102, 106, 291 S. W. 839, 840 (1927); *Jones v. State*, 161 Tenn. 370, 373, 33 S. W. 2d 59, 60 (1930); *Vaughn v. State*, 178 Tenn. 384, 386-87, 158 S. W. 2d 715, 716 (1942); *Thompson v. State*, 185 Tenn. 73, 75, 203 S. W. 2d 361 (1947); cf. *Lea v. State*, 181 Tenn. 378, 381, 181 S. W. 2d 351, 352 (1944).

"Probable cause is such a state of facts in the mind . . . as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty." *Bacon v. Towne*, 4 Cush. 217, 238-39 (Mass. 1849). When there is no dispute as to the facts introduced to establish probable cause, then the question whether they do constitute reasonable or probable cause is one of law for determination by the court. See *Wiley v. State*, 19 Ariz. 346, 170 Pac. 869, 873 (1918). However, this general rule as to which body has the *onus* of establishing probable cause is not without exception: ". . . and for the judge to instruct the jury in a criminal case that there was or was not reasonable cause is to tell them that the defendant has or has not established his defense, a question solely for their determination." *State v. Autheman*, 47 Idaho 328, 334, 274 Pac. 805, 808 (1929). As stated in the annotation in L. R. A. 1915D, 1, 3 (commenting, however, on probable cause in cases of malicious prosecution): "It is the theory of our law, and the practice generally, that twelve jurymen, themselves presumed to be reasonable men, are better fitted to decide what was the proper conduct of a reasonable man in a particular case than the judge, as the question is: what would a reasonable or ordinarily prudent man have done under the circumstances; and not what one learned in the law, as the judge is supposed to be, would have done."

arrest of a certain person, and knows the offense alleged therein, has reasonable cause to believe the person named in the warrant has committed the crime stated and hence may arrest him without a warrant if the crime is a felony.<sup>407</sup> A telegram from another officer, for example, stating that the sender has a warrant for the arrest of a certain person for a specified felony gives the recipient reasonable ground to believe the person named has committed that felony.<sup>408</sup> And the same is true of the governor's proclamation offering a reward for the arrest of a felon.<sup>409</sup>

*Credible information.* From earliest times "credible information from others" has been held sufficient for reasonable cause to believe,<sup>410</sup> hence "the representation of a credible person that a felony has been committed" by a particular individual is sufficient to create a reasonable suspicion of his guilt.<sup>411</sup> An anonymous communication by mail or telephone "without the disclosure of the informant and the source of his information" is clearly insufficient.<sup>412</sup> Such a communication may justify an officer in making an investigation and, if it squares with information already known or subsequently acquired, may be considered as one of several factors which may together result in a reasonable ground for suspicion.<sup>413</sup> Information received by an officer from a stranger may be sufficient for him to act upon where he has an opportunity to talk to the person and judge of his credibility.<sup>414</sup>

And the report of a liquor felony may be sufficient to give the officer reasonable cause to believe that the one accused is guilty thereof, although received from a rival bootlegger who had been rendered infamous by conviction of chicken stealing, if the officer had known the informer a long time and had found that he always told the officer the truth.<sup>415</sup>

407. *People v. Proteau*, 297 Mich. 263, 297 N. W. 485 (1941); *Drennan v. People*, 10 Mich. 169 (1862). "[H]is knowledge that a warrant has been issued for the arrest of the person charged therein with a felony, is sufficient ground for a reasonable suspicion that such person is guilty of the felony." RESTATEMENT, TORTS § 126, comment b (1934). "... information to the officer that a warrant has been issued will justify his belief that the person named has committed the felony stated." Waite, *Some Inadequacies in the Law of Arrest*, 29 MICH. L. REV. 448, 460 (1931).

408. *Kratzer v. Matthews*, 233 Mich. 452, 206 N. W. 982 (1926); *Burton v. New York Central & H. R. R.*, 147 App. Div. 557, 132 N. Y. Supp. 628 (2d Dep't 1911).

409. *Eanes v. State*, 25 Tenn. 53 (1845). A police officer is precluded by public policy from demanding or enforcing a reward for an arrest. See *Stair v. Heska Amone Congregation*, 128 Tenn. 190, 193, 159 S. W. 840, 841 (1913).

410. 2 HALE P. C. \*87, 89.

411. *Jones v. State*, 161 Tenn. 370, 33 S. W. 2d 59 (1930); see *Gill v. State*, 134 Tex. Cr. 363, 364-65, 115 S. W. 2d 923, 924 (1938); Note, 25 IOWA L. REV. 368 (1940).

412. See *People v. Guertins*, 224 Mich. 8, 10, 194 N. W. 561, 562 (1923).

413. Where the defendant had for some time been suspected by officers of engaging in unlawful transportation of liquor, an anonymous telephone call from a neighboring city that he was on a certain car with a suitcase full of whiskey, followed by the officer's finding him there with a suitcase which he refused to open for inspection, justified the officer in arresting him without a warrant. *People v. Ward*, 226 Mich. 45, 196 N. W. 971 (1924); cf. *Cortes v. State*, 135 Fla. 589, 185 So. 323 (1938); *State v. Kittle*, 137 Wash. 173, 241 Pac. 962 (1926).

414. *Grau v. Forge*, 183 Ky. 521, 209 S. W. 369 (1919); *People v. Wallace*, 245 Mich. 310, 222 N. W. 698 (1929).

415. *Vaughn v. State*, 178 Tenn. 384, 158 S. W. 2d 175 (1942).

Two cases may be added for illustration. A police officer was informed that a negro man would transport and deliver a gallon of "red liquor" to 605 East Main Street; that two colored men would be walking together, one in front of the other, and that the whiskey would be concealed under the coat of one of them. Going to the place described, the officer saw two colored men, one of whom was pointed out and arrested. It was held that the officer had reasonable cause to believe the arrestee was committing a felony.<sup>416</sup> Officers received information that 15 gallons of whiskey would be delivered to an unknown party at 23rd and Washington streets in Chattanooga, on the evening of October 26, 1928, in an old Ford touring car with an out-of-state license. There at the appointed time the officers saw a car fitting the description given, and arrested the driver. The arrest was held to be lawful,<sup>417</sup> the court saying: "The information received by the arresting officers, coupled with the subsequent circumstances, was sufficient to lead them to the conclusion that a felony was in fact being committed by the occupant of the car."<sup>418</sup>

It is hardly necessary to add the caution that authority to arrest without a warrant on reasonable suspicion of felony is limited to cases in which the crime is still punishable as such, or is reasonably believed to be so. There is no privilege to arrest one without a warrant for a felony as to which, to the knowledge of the arrester, the arrestee has been acquitted or pardoned, or has satisfied his sentence, or been protected from prosecution by the running of the statute of limitations.<sup>419</sup>

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416. *Jones v. State*, 161 Tenn. 370, 33 S. W. 2d 59 (1930).

417. *Stone v. State*, 161 Tenn. 290, 30 S. W. 2d 247 (1930).

418. *Id.* at 291, 30 S. W. 2d at 247. Police officers were justified in believing that a felony was about to be committed, so as to authorize the arrest, when they were informed by radio broadcast that two men were concealing themselves on a building, and found on the roof two suitcases and two men hiding in a corner, one of whom had a punch bar protruding out of his hip pocket. *Trousdale v. State*, 168 Tenn. 210, 76 S. W. 2d 646 (1934).

Information received by an officer from a friend that a tall, slim man driving a Ford coupe, with a tan top, bearing license number 988-216, had been "sticking up oil stations," gave the officer reasonable ground for believing that a person answering that description and driving that car was implicated in one or more robberies. *People v. Filas*, 369 Ill. 78, 15 N. E. 2d 718 (1938); cf. *State v. Harlow*, 327 Mo. 231, 37 S. W. 2d 419 (1931). And an officer who saw two persons running at night, one pursuing the other and calling "stop thief," had reasonable ground to believe the person in the lead had committed larceny. *People v. Kilvington*, 104 Cal. 86, 37 Pac. 799 (1894).

On the other hand, a general cry of "hold up" which is not accompanied by any words or conduct tending to single out the offender, does not authorize officers to arrest someone they think might be guilty of robbery. *People v. Mirbelle*, 276 Ill. App. 533 (1934). Robbery was reported to the police with a description of the license number and make of car in which the robber fled. Officers went to the place of business of the owner of the car described and were told that C had just used it and had departed in another car but would soon return. This was held sufficient to authorize the officers to arrest C without a warrant. *Carrizales v. State*, 215 S. W. 2d 342 (Tex. Cr. 1948).

419. RESTATEMENT, TORTS § 119, comment f (1934).

## 5. On Charge of Felony Preferred by Another

At one period in the development of the law of arrest it seemed as if a charge of felony preferred by another would be ranked as one of the "warrants,"—in the ancient and broad use of the word.<sup>420</sup> It was spoken of as if it gave as much authority to make the arrest as the oral order of a magistrate to arrest for an offense committed in his presence. According to some of the indications the officer could proceed without hesitation, leaving the entire responsibility upon the one who had preferred the charge.<sup>421</sup> An important limitation appeared later<sup>422</sup> and has been codified in the following form: "An officer may, without a warrant, arrest a person: . . . (4) on a charge made, upon reasonable cause, of the commission of a felony by the person arrested."<sup>423</sup> The word "charge" as so used does not mean a formal written charge made to a magistrate but an oral accusation made to the officer himself.<sup>424</sup>

The phrase "upon reasonable cause" in this statute means that the charge must be preferred by a credible person or must be supplemented by other facts or information.<sup>425</sup> Such a charge of felony would give the officer rea-

420. The word "warrant" was used in *Beckwith v. Philby*, 6 B. & C. 635, 637, 108 Eng. Rep. 585 (K. B. 1827).

421. Lord Hale says: "And it appears by the books before-mentioned, that in cases of arrests of this or like nature, the constable may execute his office upon information and request of others, that suspect and charge offenders, . . ." 2 HALE P. C. \*89-90. The most extreme statement of the point is by Mr. Justice Buller, in *Williams v. Dawson*, Nisi Prius (1788), quoted in *Hobbs v. Branscomb*, 3 Camp. 420, 421, 170 Eng. Rep. 1431, 1432 (K. B. 1813). It is there said that if an officer "receives a person into custody, on a charge preferred by another of felony or a breach of the peace, there he is to be considered as a mere conduit; and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable." The phrase "receives a person into custody" suggests that the arrest may have been made by a private person who merely turned the arrestee over to an officer to take before a magistrate. If so the case is not unusual. Where an arrest is made by a private person upon his own responsibility the arrestee should be taken before a magistrate without undue delay and an officer who merely assists in causing this to be done does not incur liability thereby. This authority of the officer is frequently incorporated in a special statute, as in § 11540. The statement quoted from Mr. Justice Buller was approved, however, in *Hobbs v. Branscomb*, where the arrest had not been made by a private person but was made by the officers on a charge preferred by a private person. This seems to suggest complete protection to the officer who makes an arrest on a charge preferred by another with the sole responsibility resting upon that other. Lord Mansfield had said much the same a few years earlier: ". . . if a man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine, and commit or discharge." *Samuel v. Payne*, 1 Doug. 359, 360, 99 Eng. Rep. 230, 231 (K. B. 1780); see *Hedges v. Chapman*, 2 Bing. 523, 526, 130 Eng. Rep. 408, 409 (C. P. 1825).

422. Some qualification was to be expected and was made very shortly. Just a few years after *Hobbs v. Branscomb* an officer, without a warrant, made an arrest for receiving stolen property on a charge preferred by a young thief. It was held unlawful for him to deprive a person of his liberty on such information, without further evidence. *Isaacs v. Brand*, 2 Stark. 167, 171 Eng. Rep. 609 (K. B. 1817).

423. § 11536(4).

424. *Haggard v. First National Bank of Mandan*, 72 N. D. 434, 8 N. W. 2d 5 (1942).

425. The arrest was "without a warrant, and merely upon a charge made against the prisoners by Sharp." This "furnished 'a reasonable cause of suspicion' that a felony

sonable ground to believe a felony had been perpetrated by the one accused<sup>426</sup> and hence adds little to the officer's authority to arrest *on reasonable suspicion of felony*.<sup>427</sup>

Just as an officer has no authority to arrest without a warrant on reasonable suspicion of a misdemeanor not committed in his presence, so he has no authority to arrest on a charge of misdemeanor preferred by another.<sup>428</sup>

#### 6. On Official Information

The common law of arrest developed before the day of the telephone, the telegraph, the radio, and the official police bulletin. These, together with changes such as the substitution of the automobile for the horse as the common means of transportation, require certain additions to the authority of an officer to arrest without a warrant.

It is commonplace today for important parts of the instructions issued by the headquarters of a law-enforcement unit to be sent to the various officers by radio and by an official bulletin issued periodically. It is commonplace also for one officer to receive an official communication from another officer by telephone, telegraph or letter. Due recognition should be given to such official communications. No difficulty is encountered in the felony field. If the official communication directs the arrest of a certain person for a specified felony,<sup>429</sup> or states that a warrant has been issued for his arrest on such a charge, the recipient has reasonable cause to believe him guilty thereof and may arrest him without a warrant on this ground. But it is different if the offense charged is a misdemeanor.

Tennessee has taken an important step in this regard but unfortunately the provision was tacked on to a section dealing with fugitives from other states.<sup>430</sup> This is unfortunate for two reasons: (1) it is likely to be over-

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had been committed; and this was sufficient for their justification." *Lewis v. State*, 40 Tenn. 127, 143, 146 (1859).

426. "Authorities generally appear to recognize a definite accusation by a reliable party as reasonable cause for belief on the part of the officer of the commission of a felony." *Jones v. State*, 161 Tenn. 370, 374, 33 S. W. 2d 59, 60 (1930). It has been held that an officer who has made an arrest on a charge of felony preferred by another may be required to reveal the name of the informant at the trial (although it is not required to appear in the affidavit) so that judge and jury may determine if the arrest was upon reasonable cause. *Smith v. State*, 169 Tenn. 633, 90 S. W. 2d 523 (1936); *United States v. Heitner*, 149 F. 2d 105 (2d Cir. 1945). See 46 HARV. L. REV. 343 (1932).

427. "If the mere assertion of a third person, that an individual has committed a felony is sufficient to warrant a constable in apprehending the party charged, a fortiori a suspicion formed by the constable on reasonable grounds and arising from the conduct of the suspected person, will justify the constable in arresting and detaining him." *Beckwith v. Philby*, 6 B. & C. 635, 637, 108 Eng. Rep. 585-86 (K. B. 1827). The American Law Institute concluded that the officer's authority to arrest on reasonable suspicion of felony includes his power to arrest on a charge of felony preferred by another and did not mention the latter. RESTATEMENT, TORTS § 121 (1934).

428. *Hurd v. State*, 119 Tenn. 583, 108 S. W. 1064 (1907).

429. Cf. *Gray v. State*, 243 Wis. 57, 9 N. W. 2d 68, 72 (1943).

430. § 11927. "If any person be found in this state charged with any felony or misdemeanor, punishable by imprisonment, committed in any other state or territory of the

looked; (2) it has unnecessary limitations arising out of the "fugitive" idea. Under this provision if a warrant is issued for an offense committed in the county of issuance and the accused has left that county (or leaves thereafter), any officer of the county can communicate the facts to an officer of any other county by telegram, telephone message, radio message, radiogram, verbal communication or letter, including a statement of the offense charged. The officer receiving this communication is thereupon authorized to swear out another warrant based upon the information thus received. And he may either swear out this warrant first and take the accused into custody thereunder, or make the arrest first and swear out the warrant afterward. This is an effective provision which aids law enforcement, but it has this peculiar limitation: if a warrant is issued in Nashville charging a misdemeanor committed there, the chief of police of the city by radio broadcast, for example, can authorize any officer of any other county in the state to arrest the accused without a warrant, but cannot give such authority to a Nashville policeman or any other officer of Davidson County.<sup>431</sup>

What is needed is to transfer this provision from the section dealing with fugitives from justice to the general section on arrest by officers,<sup>432</sup> and to broaden it. It might take some such form as this:

"A peace officer may, without a warrant, arrest a person: . . . (5) When he is notified by telegraph, telephone, radio, or other mode of communication by another officer of this state, that such officer holds a duly issued warrant for the arrest of such person charged with a specified crime."<sup>433</sup>

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United States, and subject by the constitution and laws of the United States to be delivered over upon demand of the governor of such state or territory, such person may be arrested with or without a warrant, by any sheriff, deputy sheriff, marshal, town marshal, police officer, or any like officer, whose duty it shall be to forthwith take the prisoner before any magistrate, justice of the peace, town recorder, judge of the police court, or other officer authorized by law to act as a committing magistrate. If such a person has been arrested without a warrant, a warrant shall be immediately sworn out charging such person with being a fugitive from justice from another state, and shall contain a brief statement setting forth the state from which such person is charged to be a fugitive from justice and a brief description of the offense with which such person is charged. Any warrant charging a person with being a fugitive may be sworn out on information and belief, and the information on which sworn out shall be sufficient if based upon a telegram, telephone message, radio message, radiogram, verbal communication, or letter from any officer who, by the laws of any state or territory is authorized to make arrests, which communication shall contain a brief statement of the offense with which such fugitive is charged. Any person fleeing from one county into another county of this state may likewise be arrested and detained, on like procedure, on a charge of fleeing from one county into another county in this state."

431. It is limited to a "person fleeing from one county into another county in this state."

432. From § 11927 to § 11536.

433. Adapted from ORE. COMP. LAWS ANN. § 26-1532 (1940); cf. LA. CODE CRIM. LAW AND PROC., art. 60(e) (Dart, 1943). "An arrest may lawfully be made by a peace officer when advised by any other peace officer in the state that a warrant has been issued for the individual." WIS. STAT. § 361.44(2) (1945).



E. *Fugitives from Other States*

The statutes discussed up to this point have reference to authority to arrest for offenses triable in Tennessee and have no more bearing upon crimes committed in another state of the Union than to those committed in Canada or in China. As said by the court: "The provisions contained in our Code at § 5868<sup>434</sup> concerning arrests by private persons apply only to crimes committed in this State. The arrest and detention of fugitives from other States is regulated by wholly different provisions."<sup>435</sup> Arrests of such fugitives by officers, with or without a warrant, the court would have added had the point been involved, are governed, not by the general sections on arrest but by a different part of the code.<sup>436</sup>

Upon proper requisition of the chief executive of another state the governor will issue his warrant for the arrest and extradition of a fugitive from justice,<sup>437</sup> under which any person authorized by the governor therein may take the fugitive into custody and surrender him to the authorities of the demanding state.<sup>438</sup> Extradition proceedings take time, however, and it may

434. Now § 11541.

435. *Tarvers v. State*, 90 Tenn. 485, 499, 16 S. W. 1041, 1044 (1891).

436. §§ 11925-11935. And now it would be necessary to add also the Uniform Law on Fresh Pursuit, §§ 11546.1-11546.8. A warrant issued in one state has no force beyond its territorial boundaries. *Stuart v. Mayberry*, 105 Okla. 13, 231 Pac. 491 (1924); see *Tarvers v. State*, 90 Tenn. 485, 495, 16 S. W. 1041, 1043-44 (1891).

437. §§ 11925, 11926. A warrant issued by the governor's secretary, in the governor's name, while the governor is away, is invalid and will entitle a prisoner arrested thereunder to be released if there is no other authority to hold him. The reason is that executive discretion is to be exercised and it cannot be delegated. The discretion involves the regularity of the requisition including the formal accusation of crime (a question of law) and whether the accused is a fugitive from justice (a question of fact). The guilt or innocence of the fugitive is not included in this inquiry because it can be determined only upon the trial in the demanding state. *State ex rel. Redwine v. Selman*, 157 Tenn. 641, 12 S. W. 2d 368 (1928). Accord as to the last sentence: *State ex rel. Lea v. Brown*, 166 Tenn. 669, 64 S. W. 2d 841 (1933), *cert. denied*, 292 U. S. 638 (1933). A prisoner may also be entitled to release on habeas corpus proceedings if the governor's warrant is insufficient. *State ex rel. Sivley v. Hackett*, 161 Tenn. 602, 33 S. W. 2d 422 (1930).

The right to extradite persons charged with crime in another state is not based upon state statutes but upon the United States Constitution and statutes. *State ex rel. Brown v. Grosch*, 177 Tenn. 619, 152 S. W. 2d 239 (1941). And the federal law provides only for the extradition of one who has fled from one state to another. Hence one who has committed a crime in another state without going there,—as by shooting across the boundary line, is not extraditable under the provisions of the federal law. *In re Mohr*, 73 Ala. 503 (1883); *State v. Hall*, 115 N. C. 811, 20 S. E. 729 (1894). The failure of Congress to provide for extradition in such a case does not exclude this from possible state action, but leaves the state free to provide for the arrest and surrender of one wanted for trial in another state under circumstances not included in the federal provisions. *Innes v. Tobin*, 240 U. S. 127, 36 Sup. Ct. 290, 60 L. Ed. 562 (1916); see Larremore, *Inadequacy of the Present Federal Statute Regulating Interstate Rendition*, 10 Col. L. Rev. 208 (1910). The Uniform Criminal Extradition Act, § 6, expressly provides for the extradition of one who has committed a crime in another state without being there. As of January 1, 1949, this statute had not been enacted in Tennessee.

The statute providing for the extradition of a fugitive from another state upon proper requisition therefrom has this qualification: "if such person is not held in custody or under bail to answer for any offense against the laws of the United States or of this state, . . ." § 11925. This is a safeguard which may be waived by the governor. Such waiver is a matter of executive discretion and will not be reviewed by the court. *State ex rel. Brown v. Grosch*, 177 Tenn. 619, 152 S. W. 2d 239 (1941).

438. § 11932.

be important to have the fugitive in custody or on bail<sup>439</sup> before these are completed. The statute expressly authorizes any officer,<sup>440</sup> with or without a warrant, to arrest any extraditable fugitive "found in this state charged with any felony or misdemeanor, punishable by imprisonment, committed in any other state or territory of the United States. . . ." <sup>441</sup> This arrest may be made by the officer as a result of information received by "telegram, telephone message, radio message, radiogram, verbal communication, or letter from any officer who, by the laws of any state or territory is authorized to make arrests, which communication shall contain a brief statement of the offense with which such fugitive is charged." <sup>442</sup> Such a communication authorizes the officer to swear out a "fugitive warrant" for the arrest of the fugitive,<sup>443</sup> and he may do this first, if time is available, or may make the arrest first and swear out the warrant afterwards.<sup>444</sup> In either event he shall "forthwith take the prisoner before any magistrate, justice of the peace, town recorder, judge of the police court, or other officer authorized by law to act as a committing magistrate." <sup>445</sup> If there is reasonable cause to believe the prisoner is an extraditable fugitive he is kept in custody or released on bail to await the governor's warrant of extradition.<sup>446</sup> If the governor's warrant does not arrive within a reasonable time the fugitive will be discharged.<sup>447</sup> This discharge, however, would not prevent his rearrest on the governor's warrant if it is issued later.<sup>448</sup>

One of the most useful steps in the direction of modernizing the en-

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439. A fugitive may be released on a proper bail bond, unless he is charged with a capital crime. §§ 11929, 11930, 11931, 11933.

440. ". . . any sheriff, deputy sheriff, marshal, town marshal, police officer, or any like officer. . . ." § 11927. This section is quoted in full, *supra* note 430. The American Law Institute has stated that the *common law* authority to arrest on reasonable suspicion of felony applies whether the felony was committed in the state in which the arrest is made or in any other state of the Union. RESTATEMENT, TORTS § 119, comment *e*, 121, comment *b* (1934). If so this rule has been entirely displaced by statute. The section quoted above authorizes such arrest only by an officer. §§ 11546.1-11546.8 authorize *officers* of other states to enter Tennessee upon fresh pursuit of a fleeing felon and make the arrest here. § 11932 authorizes *any person* so designated in the governor's warrant of extradition to execute that warrant. This might be a private person and this is quite likely. The governor may designate the official representative of the demanding state to make the arrest, and this foreign officer is a "private person" in Tennessee.

441. § 11927. This and the two following sections have no bearing upon habeas corpus proceedings brought by one held under a governor's warrant of extradition. See *State ex. rel. Van Scoyoc v. State*, 171 Tenn. 357, 361, 103 S. W. 2d 26, 27 (1937). But cf. § 11928.

442. § 11927.

443. *Ibid.*

444. It seems useless to swear out a warrant of arrest after the person wanted is in custody, and this is not generally required in Tennessee. But it is in case of the arrest of a fugitive. *Ibid.*

445. *Ibid.*

446. §§ 11928-31, 11933-35. Irregularities in the proceedings before the magistrate will not entitle the prisoner to release on habeas corpus if it appears at the hearing that he is an extraditable fugitive. *State ex. rel. Knowles v. Taylor*, 160 Tenn. 44, 22 S. W. 2d 222 (1929).

447. § 11930.

448. § 11932.

forcement of justice is the Uniform Act on Fresh Pursuit<sup>449</sup> which gives to officers of another jurisdiction "in fresh pursuit" of one reasonably believed to have committed a felony in such other jurisdiction the authority to cross the boundary line into Tennessee with the same authority to arrest the fugitive and hold him in custody as local officers have in regard to one believed to have committed a local felony. This act places no limitation upon the distance the foreign officer can travel as long as he remains in fresh pursuit, and "fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay." If arrested, the fugitive is to be taken before a magistrate, or court of general sessions,<sup>450</sup> of the county in which the arrest is made, to be kept in custody or on bail to await extradition proceedings (or to be discharged if it is determined that the arrest was unlawful).<sup>451</sup>

449. § 11546.1. "Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state."

§ 11546.2. "If an arrest is made in this state by an officer of another state in accordance with the provisions of section 1 [§ 11546.1] of this act he shall without unnecessary delay take the person arrested before a magistrate and/or courts of general sessions, or or general sessions court where such courts exercise and possess the jurisdiction formerly possessed by justices of the peace of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate and/or courts of general sessions, or general sessions court where such courts exercise and possess the jurisdiction formerly possessed by justices of the peace, determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state, or admit him to bail for such purpose. If the magistrate and/or courts of general sessions, or general sessions court where such courts exercise and possess the jurisdiction formerly possessed by justices of the peace determines that the arrest was unlawful he shall discharge the person arrested."

§ 11546.3 "Section 1 [§ 11546.1] of this act shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful."

§ 11546.4. "For the purpose of this act the word 'state' shall include the District of Columbia."

§ 11546.5. "The term 'fresh pursuit' as used in this act shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay."

§ 11546.6. "It shall be the duty of the secretary of state (or other officer) to certify a copy of this act to the executive department of each of the states of the United States."

§ 11546.7. "If any part of this act is for any reason declared void, it is declared to be the intent of this act that such invalidity shall not affect the validity of the remaining portions of this act."

§ 11546.8. "This act may be cited as the Uniform Act on Fresh Pursuit."

450. The statute adds: "or general sessions court where such courts exercise and possess the jurisdiction formerly possessed by justices of the peace. . . ." The fact that an officer has arrested a fugitive in another jurisdiction lawfully does not give him authority to carry the prisoner back to his own state. *Collier v. Vaccaro*, 51 F. 2d 17 (4th Cir. 1931).

451. No matter how a prisoner happens to be in custody in one jurisdiction he cannot be taken into another jurisdiction lawfully for trial there without extradition

## IV. PLACE OF ARREST

A. *In the Bailiwick*

The place of arrest in cases in which the apprehension results from the execution of a warrant has received attention and will not be reconsidered here. An officer acting *without* a warrant has no authority *as an officer* to make an arrest outside of his bailiwick<sup>452</sup> unless so authorized by some special provision of the law.<sup>453</sup> This means that without such special authorization a state officer such as a member of the Tennessee Highway Patrol may make such an arrest anywhere in the state,<sup>454</sup> a county officer such as a sheriff or his deputy may do so anywhere in the county,<sup>455</sup> and a city police officer within the corporate limits of his city or town.<sup>456</sup> The possibility of broader authority by special provision must not be overlooked. For example, the police authority of all incorporated towns and cities is extended for a distance of one mile beyond the corporate limits for the suppression of disorderly acts and practices, subject to the limitation that it cannot extend beyond the county nor within one mile of any other incorporated town or city;<sup>457</sup> and if a person who has been lawfully arrested escapes or is rescued, the person from whose custody he escapes or is rescued may immediately pursue and retake him without a warrant in any place within the state.<sup>458</sup> Express authority for an officer to *execute a warrant* in any part of the state does not em-

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proceedings unless such proceedings are expressly waived by him,—with one possible exception. In a Kentucky case an officer made an arrest in Kentucky but near the boundary line. The prisoner pushed the officer across the line into a neighboring state, whereupon the officer immediately carried the other back into Kentucky. This was held to be proper, the court saying: "The arrest having been legally made in Kentucky, Archer could not defeat the arrest by forcibly carrying the arresting officer out of his bailiwick." *Bowlin v. Archer*, 157 Ky. 540, 543, 163 S. W. 477, 479 (1914). If extradition is waived the officer should be cautioned to procure a written waiver signed by the prisoner. This is important as a matter of evidence if the prisoner should later claim to have been kidnapped. Such a claim would not prevent the trial of the fugitive. *State v. Ross*, 21 Iowa 467 (1866). But it might embarrass the officer.

452. *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906); *Martin v. Houck*, 141 N. C. 317, 54 S. E. 291 (1906); *Irwin v. State*, 147 Tex. Cr. 6, 177 S. W. 2d 970 (1944); *Karney v. Boyd*, 186 Wis. 594, 203 N. W. 371 (1925). "2. The sheriff, and 3. The coroner, may apprehend any felon within the county without warrant." 4 BL. COMM. \*292.

453. *Boswell v. State*, 31 Ala. App. 518, 19 So. 2d 94 (1944).

454. § 11463. This is not expressly stated but it is to be inferred from this and the preceding section.

455. *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906).

456. *Karney v. Boyd*, 186 Wis. 594, 203 N. W. 371 (1925). Compare § 3343, which authorizes such an officer to execute a state warrant within said municipality, *with* § 3343.1, which authorizes a police officer of a municipality within the state having a duly constituted city or municipal court, to execute municipal warrants within the county. These, of course, have reference to the execution of warrants but there would be no occasion for these provisions if a city officer had general authority to arrest anywhere in the county. The territorial jurisdiction of a policeman is restricted to the confines of the city and he is without authority to execute a search warrant outside the city limits. *Irwin v. State*, 147 Tex. Cr. 6, 177 S. W. 2d 970 (1944).

457. § 3336.

458. § 11545.

power him to arrest without a warrant outside his own bailiwick.<sup>459</sup> On the other hand, the assignment of an officer to a particular beat or district is a mere device for the distribution of labor under normal circumstances and does not deprive the officer of his authority to arrest anywhere within the bailiwick, in his capacity as officer,—although his authority could be limited to a part of such territory by a rule expressly intended for that purpose.<sup>460</sup>

It is hardly necessary to add that no state officer exercises his authority as such outside the territory of his state, unless he has additional authority from some other state. The Fresh Pursuit Act<sup>461</sup> authorizes the officers of other states to come into Tennessee in fresh pursuit of a fleeing felon and make the arrest here with all of the power and authority of a local officer. But this statute does not (and could not) authorize Tennessee officers to make arrests outside of our boundaries. Such authority could be conferred only by the state in which the arrest was to be made.<sup>462</sup> However, the other state may give a Tennessee officer authority to arrest there as a private citizen. If, for example, a Tennessee officer pursues an offender across the line into North Carolina, and the offense continues after the other state is reached, the Tennessee officer could make the arrest there for the offense committed in his presence because the North Carolina law gives such authority to a private citizen.<sup>463</sup>

### B. Outside the Bailiwick

What has been said has reference to the power of an officer to arrest in his official capacity. When acting without a warrant outside his bailiwick, unless aided by some special authority of law,<sup>464</sup> an officer has only the authority which a private person may have in apprehending criminals.<sup>465</sup> Needless to say, in the absence of some unusual restriction he would not

459. *Henson v. State*, 120 Tex. Cr. 176, 49 S. W. 2d 463 (1932).

460. The City Council passed a resolution to employ negro policemen for negro sections only and the chief of police prohibited negro policemen from arresting white persons. Held, the city charter empowered the chief to assign duties and areas to members of the force, and to limit their power to make arrests or prohibit them from making arrests at all. The wisdom of his decisions is not a matter for judicial review. *Yarn v. Atlanta*, 203 Ga. 543, 47 S. E. 2d 556 (1948).

461. §§ 11546.1-11546.8. As to the arrest of fugitives in general see *supra*, Section III, E, "Authority to Arrest—Fugitives from Other States."

462. As of January 1, 1949, Virginia is the only state bordering on Tennessee which has adopted the Uniform Fresh Pursuit Act. An officer sent by the governor of Tennessee to bring back a fugitive from some other state may be the one named in the extradition warrant, issued by the other governor, to make the arrest there. If so his authority in the other state would come solely from that warrant.

463. See *Jennings v. Riddle*, 20 Tenn. App. 89, 90, 95 S. W. 2d 946, 947 (E. S. 1935).

464. If a prisoner escapes after he has been lawfully arrested by an officer in his own county, the officer could pursue the fugitive and arrest him, in his capacity as an officer, anywhere in the state. This special authority is given him by § 11545.

465. *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906); *Henson v. State*, 120 Tex. Cr. 176, 49 S. W. 2d 463 (1932).

have less power than this.<sup>466</sup> If an officer sees a public offense committed, he may arrest the offender outside his bailiwick, because any private person could do as much.<sup>467</sup> This would be true whether the officer merely happened to be outside his bailiwick at the moment, or passed the boundary line in fresh pursuit of the fleeing offender<sup>468</sup> (assuming that he does not go outside of the state).<sup>469</sup> Furthermore an officer could arrest outside of his bailiwick on reasonable suspicion of felony (subject to the risk that the arrest might be unlawful if no such felony had in fact been committed)<sup>470</sup> because this also is within the authority of any private person.<sup>471</sup> In such an arrest, also, the element of fresh pursuit would be necessary because the law with reference to arrest by private persons does not contemplate that they will take it upon themselves to go from one county to another in search of criminals except in cases of prompt action to make an original arrest or a recapture after escape.<sup>472</sup>

Needless to add, if an officer makes an arrest in the capacity of a private person he is subject to whatever limitations or restrictions are placed upon such a person in making an arrest.<sup>473</sup> This fact and the very limited use of such authority by members of the general public account for a paradox: The law with reference to the authority given private persons to make an arrest is more important to peace officers than to anyone else.

It is quite unfortunate to place a peace officer in the position of a private person with reference to authority to make an arrest merely because he happened to be outside his bailiwick when the offense was committed in his presence, or crossed the boundary line in fresh pursuit of one he was lawfully attempting to arrest in his own bailiwick. It is recommended that the law be amended to authorize an officer who acts promptly or on fresh pursuit to arrest, anywhere in the state, one reasonably suspected of having committed a felony or who has committed any public offense in the presence of the officer.<sup>474</sup>

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466. Such a limitation would be possible. If, by rule of the department, negro policemen are prohibited from arresting white persons, such an officer would have less authority to arrest than a private person under certain situations. *Yarn v. Atlanta*, 203 Ga. 543, 47 S. E. 2d 556 (1948).

467. § 11541(1). The text is intended only as a statement of Tennessee law. In some jurisdictions a private person is not authorized to arrest for a misdemeanor committed in his presence unless it amounts to a breach of the peace. A. L. I. CODE OF CRIMINAL PROCEDURE 239 (Official Draft with Commentaries, 1931).

468. *Morris v. Combs' Adm'r*, 304 Ky. 187, 200 S. W. 2d 281 (1947).

469. Even the Uniform Fresh Pursuit Act (where in force) authorizes only officers to cross the state boundary line in fresh pursuit (and limits this to cases in which the one pursued is a felon or is reasonably believed to be so).

470. *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906).

471. § 11541(3).

472. *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906).

473. *Ibid.*

474. This is the provision in the proposed Uniform Act on Intrastate Fresh Pursuit.

*C. In a Federal Enclave*

The Constitution authorizes the federal government to exercise exclusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be, if the purchase is for the erection of forts, magazines, arsenals, dockyards and other needful buildings.<sup>475</sup> And an act of the legislature of the State by which its consent is given to the purchase of a parcel of land by the United States for any of the uses specified in the Constitution "vests the exclusive jurisdiction thereof in the United States, without there being a cession of jurisdiction in terms."<sup>476</sup> "A great variety of cessions have been made by the states under this power. And generally there has been a reservation of the right to serve all state process, civil and criminal, upon persons found therein."<sup>477</sup> There is no serious objection to this because such rights would remain in the State without express reservation since "ceded lands within a State are not to be made places of refuge from its civil or criminal jurisdiction."<sup>478</sup>

Land purchased by the federal government, with consent of the State, for any of the specified purposes becomes in effect a federal enclave. Offenses committed thereon are federal offenses, although defined and punished in terms of the state law under the Simulative Crimes Clause<sup>479</sup> unless expressly made punishable by enactment of Congress. For crimes committed elsewhere in the State an arrest may be made in a federal enclave, by state officers under a state warrant, by reason of the express or implied reservation mentioned.<sup>480</sup> The authority of state officers to arrest therein for such an offense, without a warrant, would seem to be within the implied reservation, although not within the words of the express reservation because it does not result from the execution of "process."<sup>481</sup>

*Military reservations.* A special word of caution is needed in regard to forts, military or naval reservations and other places in control of the armed forces. A civil officer (state or federal) seeking the custody of one in such

475. U. S. CONST. Art. 1, § 8, cl. 17. Included within the general provisions are post offices, navy yards, military hospitals, military reservations, customs houses, locks and dams for the improvement of navigation, and soldiers' homes. ROTTSCHAEFER, CONSTITUTIONAL LAW 95 (1939).

476. 7 OPS. ATT'Y GEN. 573 (1855). See, in general, 2 VAND. L. REV. 304 (1949).

477. 2 STORY, COMMENTARIES ON THE CONSTITUTION, § 1225 (3d ed. 1858).

478. 7 OPS. ATT'Y GEN. 633-34 (1856).

479. 18 U. S. C. § 13 (1948).

480. "But where land within a State is acquired by the United States, with the consent of a State, then under article 1, section 8, subsec. 17, of the federal constitution, the jurisdiction of the United States is complete and exclusive, and the reservation contained in such grants, to the effect that the State shall have the right to serve civil and criminal process within the territory ceded, is limited to causes of action arising outside of the ceded territory; the purpose of such reservation being to prevent the territory's becoming an asylum for fugitives from justice." *Divine v. Unaka National Bank*, 125 Tenn. 98, 107, 140 S. W. 747, 749 (1911).

481. An arrest without a warrant in a federal enclave by a state officer for an offense committed elsewhere in the state is clearly within the *purpose* of the reservation,—not making the enclave a refuge for state offenders.

a place never undertakes to make the arrest himself. He goes directly to the commanding officer, identifies himself, displays his authority, states his mission and requests that the person wanted be delivered to him. He should not be impatient because authority from Washington may be needed for the delivery of this person. Such authority will usually be obtained with dispatch unless the person wanted is a military or naval prisoner, in which case he will ordinarily not be delivered to civil authorities until he has served his sentence or his case has been disposed of otherwise by the armed forces.<sup>482</sup>

If the commanding officer should refuse to deliver the person, the civil officer should request a written statement showing the reason for the refusal. There is nothing more he can do at that time and place. From then on it is entirely a matter for the courts.

#### V. TIME OF ARREST

An authorized arrest by an officer, whether for felony or misdemeanor and whether with or without a warrant, may be made on any day and at any time.<sup>483</sup> This means that it is not necessary to postpone making the arrest from Sunday until a weekday, or from night until morning. It does not mean, on the other hand, that an officer may postpone making an arrest until some indefinite time in the future, just because the statute uses the words "at any time." A warrant of arrest commands the officer "forthwith to arrest" the accused.<sup>484</sup> This does not require him in every case to abandon every other duty he may have until the apprehension is made,<sup>485</sup> but it does call for a diligent effort to make the arrest as promptly as is reasonably possible.

An arrest without a warrant also requires attention in this regard. The common law, insofar as it authorized an officer, without a warrant, to arrest for a misdemeanor committed in his presence, required the apprehension to take place "at once or on fresh pursuit."<sup>486</sup> The statutes authorize arrest for

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482. If the civil authorities desire the surrender of the person on a very serious charge, the armed forces may perhaps waive their right to keep him until their own prosecution has been completed and satisfied. An officer or enlisted man will not be delivered to state authorities without a written agreement from the governor of the state or other duly authorized officer. This agreement will assure (1) that the commanding officer of the fort or reservation will be informed as to the outcome of the trial, and (2) that the person will be returned promptly if acquitted, and will be returned after sentence is served if he is convicted and his return is desired.

483. § 11532. This is a mere restatement of the common law. *Mackalley's Case*, 9 Co. Rep. 65b, 77 Eng. Rep. 828 (K. B. 1610); *Rawlins v. Ellis*, 16 M. & W. 172, 153 Eng. Rep. 1147 (Ex. 1846). Statutes in a few states place some limitations upon arrests for misdemeanor at night or on Sunday. A. L. I. CODE OF CRIMINAL PROCEDURE 243-44 (Official Draft with Commentaries, 1931).

484. § 11523.

485. *Winston v. Commonwealth*, 188 Va. 386, 49 S. E. 2d 611 (1948).

486. *Reed v. State*, 195 Ga. 842, 25 S. E. 2d 692 (1943); *Rodriguez v. State*, 146 Tex. Cr. 206, 172 S. W. 2d 502 (1943); RESTATEMENT, TORTS § 121(c) (1934). "The common law never allowed the arrest of persons who were either guilty or suspected of having committed misdemeanors without a warrant issued by lawful authority; except in cases of an actual breach of the peace committed in the presence of the officer while



any misdemeanor committed in the arrestee's presence,<sup>487</sup> but seem not to impair the common law requirement of prompt action if such an arrest is to be made without a warrant.

In other words, the law with reference to the time of arrest does not require delay (with one exception), but it does require reasonable promptness in the execution of a warrant, and instant action or fresh pursuit in arresting for a misdemeanor without a warrant. The exception mentioned is that an arrest for a very minor offense should not be made at a time when the arrestee will have unusual delay or difficulty in obtaining bail if it could be postponed to a more opportune time without substantial risk of further harm by the offender in the meantime or inability to take him into custody later.<sup>488</sup>

As to arrests by those who are not officers, the statute says: "Arrests by private persons for felony may be made on any day and at any time."<sup>489</sup> The implication is not clear since another section authorizes a private person to arrest for any "public offense committed in his presence"<sup>490</sup> and the common law does not forbid arrests on Sunday or at night. One possible interpretation is that as far as private persons are concerned the exception mentioned above is enlarged to include any misdemeanor.<sup>491</sup>

## VI. DUTIES AND PRIVILEGES OF ARRESTER

Whenever authority to make an arrest exists, it is important to have in mind exactly what may or may not be done in the lawful effort to carry out such authority. This requires attention to (a) notice of arrest, (b) use of force, (c) search and seizure, (d) detention for questioning, and (e) disposition of arrestee.

### A. Notice of Arrest

Whatever crime one may have committed in the past, if he is engaged in no offense at the moment, he is privileged to use force, if necessary, to defend

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the person was taken in the act, or immediately after its commission." *People v. McLean*, 68 Mich. 480, 485, 36 N. W. 231 (1888). Under the Texas statute it is held that a private person, arresting for a breach of the peace committed in his presence, must make the arrest while the offense is being committed or there is continuing danger of its renewal, and that he is not entitled to pursue the misdemeanant in order to apprehend him. *Woods v. State*, 213 S. W. 2d 685 (Tex. Cr. 1948).

487. For a "public offense" committed in his presence. §§ 11536, 11541. This phrase includes misdemeanors as well as felonies.

488. "Thus an arrest on Saturday evening for a violation of a parking ordinance, there being no opportunity of a hearing or bail until Monday, is not privileged, unless there is a substantial probability that the offender will permanently leave the jurisdiction." RESTATEMENT, TORTS § 130, comment *b* (1934).

489. § 11533.

490. § 11541(1).

491. Argument: Since the statute authorizes a private person to arrest for any "public offense committed in his presence," and provides that arrests by him "for felony may be made on any day and at any time," he must not arrest for misdemeanor at an inopportune time unless there is substantial risk of further harm by the offender or inability to take him into custody later.

himself against any *unlawful* act which threatens him with death or injury or deprivation of his liberty.<sup>492</sup> And because of the mistake-of-fact doctrine it is important for him to know, or have a reasonable opportunity to know, whether he is confronted with such danger or is dealing with "a minister of justice."<sup>493</sup>

### 1. In General

For the reasons stated there is a common law requirement, subject to certain exceptions, that one who is about to take another into the custody of the law must give due notice of this fact. This notice must include a statement of the cause of the arrest, and if it is made under a warrant a statement of this fact plus an exhibition of the warrant upon request.<sup>494</sup>

*Limitations in favor of known officer.* At common law a known officer, acting within his own bailiwick is not required to state the cause of the arrest, if he is acting without a warrant, unless this information is requested; and if he has a warrant he is not required to show it until after the arrest is made, and then only upon request.<sup>495</sup>

*The statutory requirements.* "When arresting a person, the officer shall inform him of his authority and the cause of the arrest, and exhibit his warrant if he have one, except when he is in the actual commission of the offense, or is pursued immediately after an escape."<sup>496</sup> And one not an officer "shall, at the time of the arrest, inform the person arrested of the cause thereof, except when he is in the actual commission of the offense, or when arrested on pursuit."<sup>497</sup>

The wording of the first of these sections indicates an intent to make one important change in the law—that is, to require an apprehending officer to state the cause of the arrest and to exhibit his warrant if he has one, even without request (unless he is excused by special circumstances).<sup>498</sup> Apart from this change the sections were no doubt intended to codify the common law.

*"Inform" him of his authority.* The first requirement of the notice (when

492. *Starr v. United States*, 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841 (1894); *State v. Phillips*, 118 Iowa 660, 92 N. W. 876 (1902); *State v. Belk*, 76 N. C. 10 (1877).

493. *Bellows v. Shannon*, 2 Hill 86, 92 (N. Y. 1841).

494. RESTATEMENT, TORTS § 128 (1934).

495. *Id.* § 128 (1) and comment *e*.

496. § 11537.

497. § 11542.

498. "The statutes in this country generally change the common law rule by imposing the duty on the officer arresting without a warrant to make some explanation when arresting. These statutes may be divided as follows: I. 'When arresting a person without a warrant, the officer must inform him of his authority and the cause of arrest except . . .'" (citing several states including Tennessee). A. L. I. CODE OF CRIMINAL PROCEDURE 248 (Official Draft with Commentaries, 1931). For the reference to arrest with a warrant, see *id.* at 246. There is a general feeling that the cause of the arrest should be stated, even without request therefor, and this has been included in the code proposed by the Institute. *Id.* §§ 24, 25.

the arrest is not by a private person) is that "the officer shall inform him of his authority." Information can be conveyed by means other than words<sup>499</sup> and the wearing of an official uniform or the display of an official badge so as to be visible to the arrestee has long been held sufficient to inform him of the other's authority.<sup>500</sup> An officer not in uniform can give this information by the simple statement: "I am an officer of the law," or by a display of his badge, or (preferably) by both.<sup>501</sup>

*The cause of arrest.* The second part of the officer's notice, and the first part of a notice given by anyone else, is a statement of the cause of arrest. This means the offense, or threatened offense, for which the arrest is made; and under Tennessee law any arrest without this information is unlawful unless failure to give the notice of arrest is excused.

The statement of a false cause of arrest is permitted by the common law if the arrester reasonably believes a statement of the true cause would be dangerous to himself or a third person or would imperil the success of the arrest itself. Thus, if an officer intends to arrest a desperate character for murder and finds him with friends under circumstances reasonably leading the officer to believe he would be in serious danger if he mentioned the murder charge, he may state a false cause of arrest such as a traffic violation even if there has been no such violation.<sup>502</sup> The social interests involved make the statement of the false cause of arrest seem quite insignificant as compared with the loss of human life or the failure of the arrest itself. Furthermore, under such circumstances the statement of the cause of arrest could be delayed entirely until it could be made in safety, as will be explained presently; and the true reason for the excuse is that the false cause is stated (for a proper reason) at a time when no statement of the cause was needed. Nothing in the statute seems to exclude this common-law privilege to falsify in such an emergency.

If the arrester states two or more causes of the arrest, one of which is a true and proper cause, this is sufficient as far as notice of the offense is con-

499. "[T]he act of the sheriff in stepping on the car by the side of the defendant with his warrant indicated to defendant the purpose to take him into custody as distinctly as if the sheriff had walked up to him on the street and touched him on the shoulder with the announcement of arrest, and was a complete arrest." *Weissengoff v. Davis*, 260 Fed. 16, 19 (4th Cir. 1919), *cert. denied*, 250 U. S. 674 (1919).

500. *Galvin v. State*, 46 Tenn. 283 (1869); RESTATEMENT, TORTS § 128, comment *a* (1934). The officer's uniform is not notice of his official character if it is too dark for the uniform to be seen and recognized. *Yates v. People*, 32 N. Y. 509 (1865).

501. There was evidence that an officer in plain clothes threw back his coat, displayed his policeman's star, and said: "Consider yourself under arrest; I am an officer of the law." There was dispute as to this and other evidence, and the case was reversed because of improper instructions. The court found no fault with this notice. *Hurd v. State*, 119 Tenn. 583, 108 S. W. 1064 (1907). If a private person could make the arrest under the circumstances the officer is not required to make the arrest in his official capacity. RESTATEMENT, TORTS § 121, comment *d* (1934). It is wise for him to do so, however.

502. RESTATEMENT, TORTS § 128, comment *f*, and illustration 3 (1934).

cerned, even if an improper cause is also mentioned. If, for example, he is authorized to make the arrest for burglary and for this only, his statement that he makes the arrest for burglary *and arson* is satisfactory in spite of the improper addition.<sup>503</sup> On the other hand, if he is authorized to arrest for two causes and mentions one only, his omission of the other is immaterial as far as the propriety of the arrest is concerned.<sup>504</sup>

Except in cases in which the arrester is privileged to state a false cause of arrest because of danger to life or risk of failure of the apprehension itself (saving the true cause to be stated later), and cases in which an improper cause has been stated in addition to the proper one, the arrest is made in an unlawful manner if the arrester indicates to the arrestee that the apprehension is for an offense other than the true one.<sup>505</sup> This is so whether the arrest is with or without a warrant and whether the arrester mentions the wrong cause purposely or mistakenly. On the other hand, there is no rule which limits the trial of the defendant to the offense mentioned at the time of the arrest.<sup>506</sup>

## 2. Form of the Notice

No particular form of words is required in giving even that part of the notice which cannot be manifested by the uniform or the badge.<sup>507</sup> The most formal manifestation would include an adaptation of the English practice of making an arrest for crime "in the king's name."

"I arrest you for burglary in the name of the State of Tennessee by command of this warrant" (showing it).<sup>508</sup> If arrest is without a warrant and the officer is not inclined to be formal the notice may be in some such form as this: "Consider yourself under arrest for burglary. I am an officer of the law."<sup>509</sup> Neither "you are under arrest," "I arrest you," or "consider yourself

503. *Id.* § 128, comment *c*, and illustration 1. The statement of two or more offenses is advisable when the officer is in doubt. The officer arresting under a warrant may give notice that he is doing so and also that he is arresting on reasonable suspicion of arson (for example). See *id.* § 122, comment *b*.

504. *Id.* § 128, illustration 2.

505. *Id.* at comment *b*. "An arrest cannot be made for one purpose and justified for another." *Malcomson v. Gibbons*, 56 Mich. 459, 465, 23 N. W. 166, 168 (1885).

506. *Davenport v. District of Columbia*, 61 A. 2d 486 (D. C. Mun. Ct. App. 1948).

507. RESTATEMENT, TORTS § 128, comment *a* (1934).

508. The warrant of arrest reads: "... You are, therefore, commanded, in the name of the state, forthwith to arrest. . . ." § 11523. The wording is perhaps in ancient style. But in the light of the history of arrest it obviously means that the arrest is to be made in the name of the state. In theory it is in the name of the state whether so worded or not. Such form of statement is to be recommended. Since the authority in this case is the warrant, no more would be needed even if the officer was in plain clothes and did not display his badge—but the showing of the badge would be desirable.

509. The statement that he is an officer is not indispensable if he is wearing an official uniform or badge that can be seen, but it is by no means out of place. "You are under arrest for hawking and peddling without a license." Such a statement by an officer in uniform would seem to be sufficient in an arrest for this offense. Compare the warrant in *State v. Sprinkle*, 26 Tenn. 36 (1846). In this case the court said: "What more could the defendant require to inform him of what he was charged, and what he had to defend?" *Id.* at 37.

under arrest," meets the requirement of Tennessee law in the absence of an excuse for not giving the specified notice.

### 3. Time of Giving Notice

The statutory requirement is that the notice of arrest shall be given "when arresting"<sup>510</sup> or "at the time of the arrest."<sup>511</sup> These expressions are not specific with reference to the exact timing. The normal rule under such statutory provisions seems to be that the notice must precede the arrest,<sup>512</sup> but delay will be excused if there is any important reason therefor.<sup>513</sup>

*Excuses for delay.* The manifestation of purpose and authority may be postponed until a more opportune time whenever the giving of the notice at the normal time is reasonably believed by the arrester to be (1) dangerous to the arrester or to a third person, (2) likely to imperil the making of the arrest, or (3) useless.<sup>514</sup> In any such situation the notice is timely if made with reasonable promptness after the danger has ceased,<sup>515</sup> the prisoner has been safely secured, or the circumstance constituting the futility has ended.<sup>516</sup> As previously mentioned, a lone officer arresting a desperate character for murder need not announce the cause of arrest at the time if the arrestee is found in the midst of his friends. An officer who has reason to expect the arrestee to flee may place a firm grip upon him before the notice is given. And if officers bring in a prisoner in a state of senseless intoxication they are not required to state the cause of arrest and show the warrant (if any) during his period of unconsciousness.<sup>517</sup>

### 4. When Notice Not Required

To be distinguished from cases in which a temporary delay is excused, are those in which the giving of notice is dispensed with entirely.<sup>518</sup> These

510. By an officer. § 11537.

511. By a private person. § 11542.

512. See *Love v. Bass*, 145 Tenn. 522, 528, 238 S. W. 94, 96 (1921); A. L. I. CODE OF CRIMINAL PROCEDURE 249-50 (Official Draft with Commentaries, 1931).

513. See *State v. McDaniel*, 115 Ore. 187, 199, 237 Pac. 373, 376 (1925).

514. RESTATEMENT, TORTS § 128 (1934). The blackletter indicates that no notice of arrest is required in such cases but comment *g* shows that notice should be given as soon as the need for delay has ceased. The *Restatement* adds "or unnecessary" to the third category, but this is due to a failure to observe the distinction pointed out under Section VI, A, 4, "When Notice Not Required," *infra*.

515. "In many instances it is dangerous for an officer to go through the formality of stating that the accused is under arrest, and the law does not require him to do so. It is oftentimes safer to act first and talk afterward." *State v. McDaniel*, 115 Ore. 187, 191, 237 Pac. 373, 376 (1925).

516. RESTATEMENT, TORTS § 128, comment *g* (1934). An officer is not required to make known his authority and the cause of the arrest while being violently assaulted by the arrestee. *Lewis v. State*, 40 Tenn. 127 (1859). And see *Galvin v. State*, 46 Tenn. 283 (1869).

517. "If the actor reasonably believes that the other is incapable of understanding any manifestation, as where the other is intoxicated or insane, or is unfamiliar with the language, it would be absurd to require the actor to make an apparently useless demonstration." RESTATEMENT, TORTS § 128, comment *f* (1934).

518. This distinction is overlooked in the *Restatement*, but it is an obvious omission

are where the arrest is made during the actual commission of the offense or while the arrestee is in flight in the effort to avoid apprehension.<sup>519</sup>

"If the person arrested knows of the cause of his arrest, the manifestation thereof would be a mere superfluous and idle ceremony and is therefore not required. If an officer attempts to arrest or arrests another engaged in the commission of an offense or on fresh pursuit, the officer is not required to manifest the cause of arrest."<sup>520</sup>

### B. Use of Force

No problem in the law of arrest is of greater importance to the officer than that which deals with the degree of force he is privileged to use in taking a prisoner into custody. Few involve greater difficulty. It is important to consider (1) reasonable force, (2) deadly force, (3) handcuffing arrestee, and (4) breaking doors and windows.

#### 1. Reasonable Force

Unless the arrester has authority to make the particular arrest, any force to effect the apprehension will be unlawful.<sup>521</sup> Hence it is necessary to distinguish between the authority to arrest and the authority to use force in accomplishing the arrest. The general rule is that *an arrester is privileged to use reasonable force in order to make an authorized arrest*. This is not limited to arrests by peace officers. It applies whether the arrester is an officer or a private person. It assumes lawful authority for the arrest itself, and states in substance that in making or attempting such an arrest the arrester is privileged to make use of reasonable force, and is not privileged

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suggested by the comments to § 128. Thus, if giving the notice now would be dangerous, or would imperil the making of the arrest itself, or be useless, it should be omitted for the moment, but should be given "at the first practicable moment thereafter." *Id.* at comment *g*. But if the arrestee knows all that the notice could tell him the statement would be just as much a "superfluous and idle ceremony" later as now, and even at the later time it would be "absurd to require the actor to make an apparently useless demonstration." *Id.* at comment *f*.

519. "... except when he is in the actual commission of the offense, or is pursued immediately after an escape." § 11537. "... except when he is in the actual commission of the offense, or when arrested on pursuit." § 11542. *Love v. Bass*, 145 Tenn. 522, 238 S. W. 94 (1921); *State v. Parker*, 81 Tenn. 221 (1884); *Wilson v. State*, 79 Tenn. 310 (1883). The use of the word "escape" in the first of the clauses quoted above makes no change in the common law because it is not used in its technical sense, but its popular sense, and hence includes one who flees without first having been arrested. *See Lewis v. State*, 40 Tenn. 127, 147 (1859).

520. RESTATEMENT, TORTS § 128, comment *f* (1934). The comment continues: "In such a case it is extremely unlikely that the person arrested is unaware of the fact that he is committing the offense but his ignorance thereof is immaterial, unless the actor realizes or should realize that the other is not aware that his conduct constitutes an offense." Compare: The normal demand for admission, before breaking doors to execute a search warrant, is not required if there is no one there. *Collins v. State*, 184 Tenn. 356, 199 S. W. 2d 96 (1947).

521. Even touching to effect an unlawful arrest is a battery. RESTATEMENT, TORTS § 118, comment *b* (1934).

to use any greater degree of force. Hence an arrestee acts unlawfully if he employs more than reasonable force in making or attempting an arrest, however much authority he might have for the arrest itself.<sup>522</sup>

The courts should not, as stated by a federal judge, "lay down rules which will make it so dangerous for officers to perform their duties that they will shrink and hesitate from action which the proper protection of society demands."<sup>523</sup> Hence in distinguishing the degree of force permitted for the purpose of making an arrest from that which is unlawful they have carefully avoided emphasis upon slight differences.<sup>524</sup> The question is not whether the force used in a particular arrest exceeded the necessity of the case in some slight way, but whether it was grossly excessive.<sup>525</sup>

Where the arrestee is confident no flight or resistance will be attempted he should merely require the other to submit to his authority, although a technical touching is not unlawful.<sup>526</sup> If flight or resistance is encountered, or reasonably expected, appropriate steps may be taken to insure the apprehension.<sup>527</sup> What amounts to reasonable force depends upon the facts of each particular case.<sup>528</sup> Except for certain limitations on the use of deadly force, *any force* may be used which reasonably appears to be necessary to overcome resistance and prevent flight, if the arrest is lawful in other respects.<sup>529</sup> The normal mistake-of-fact doctrine applies to these cases, and "the measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary."<sup>530</sup>

522. *Mullis v. State*, 196 Ga. 569, 27 S. E. 2d 91 (1943); *Reynolds v. Griffith*, 126 W. Va. 766, 30 S. E. 2d 81 (1944).

523. *Stinnett v. Virginia*, 55 F. 2d 644, 647 (4th Cir. 1932).

524. *State v. Pugh*, 101 N. C. 737, 7 S. E. 757 (1888).

525. "An officer in making an arrest should use no unnecessary violence; but, it being his duty to make an arrest, the law clothes him with the power to accomplish that result. His duty is to overcome all resistance, and bring the party under physical restraint; and the means he may use must be coextensive with the duty, and so the law is written." *State v. Fuller*, 96 Mo. 165, 168, 9 S. W. 583, 584 (1888). See also *Mingo v. Levy*, 165 N. Y. Supp. 276 (Sup. Ct. 1917). "An officer who *intentionally* uses more force than is *reasonably* necessary in making an arrest is oppressively discharging the duties of his office." *Colorado v. Hutchinson*, 9 F. 2d 275, 276 (8th Cir. 1925). (Italics added.) "It is when excessive force has been used maliciously, or to such a degree as amounts to a wanton abuse of authority, that criminal liability will be imputed." *State v. Dunning*, 177 N. C. 559, 562, 98 S. E. 530, 531 (1919).

526. It was said in one case: "He must touch the person. . . ." *State v. Mahon*, 3 Harr. 568, 569 (Del. 1839). This is an overstatement since the arrest may be completed by submission to the asserted authority without touching. On the other hand a diligent search has failed to disclose any case holding a mere technical touching to be a battery where it was by one authorized to arrest the person touched.

527. *Barrett v. United States*, 62 App. D. C. 25, 64 F. 2d 148 (1933); *State v. McNinch*, 90 N. C. 695. (1884).

528. *Colorado v. Hutchinson*, 9 F. 2d 275, 276 (8th Cir. 1925).

529. *Barrett v. United States*, 62 App. D. C. 25, 64 F. 2d. 148 (1933); *State v. Pugh*, 101 N. C. 737, 7 S. E. 757 (1888).

530. *Barrett v. United States*, 62 App. D. C. 25, 64 F. 2d 148, 149 (1933). The wording of the American Law Institute is: "reasonably believes to be necessary." RESTATEMENT, TORTS § 132 (1934). "In the construction of these statutes we have uniformly held that the criterion of reasonable ground of belief and of the degree of force which

Where no flight or resistance is encountered or reasonably expected the arrestee is not privileged to seize and collar his prisoner rudely and with violence.<sup>531</sup> In one case, for example, officers with a posse rushed upon an arrestee, while he was quietly dining at a public hotel, and violently threw him to the floor. As the arrestee was neither a desperate character nor reasonably supposed to be such, and as there was no reason for such extreme treatment in this case, the method of the arrest was held to be clearly unlawful.<sup>532</sup> On the other hand even such measures would be privileged if they were reasonably necessary in order to accomplish the arrest without undue risk to the officers. Even striking a prisoner with a "billy" is justifiable when it is needed to subdue his persistent violence,<sup>533</sup> although this measure should be reserved for extreme situations and should be exercised with sound discretion. Needless to say, an officer should never strike an unnecessary blow prompted merely by anger or annoyance.<sup>534</sup>

## 2. Deadly Force

In a very general way it is said to be lawful to kill if necessary to arrest a felon but not if the person to be apprehended is a misdemeanor only.<sup>535</sup> Numerous exceptions to this broad generalization make it important to consider different factual situations. Among other possibilities are these:

(a) The arrestee may be fleeing to avoid arrest, or to escape from custody, and the use of deadly force may be for the sole purpose of stopping his flight.

(b) The arrestee may resist by force and the arrestee may find it necessary to use deadly force to overcome this resistance, although the arrestee is not himself in danger.

(c) The arrestee may resist with such violence that the arrestee is forced to use deadly force in his own defense.

(d) The arrestee may be killed quite unexpectedly by force neither intended nor likely to cause death or great bodily injury.

In any of these situations the arrestee may be either an officer or a private person, and if an officer, may be acting with or without a warrant. The arrestee may be guilty or innocent, and if innocent this may be because the crime

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may properly be used in making an arrest is that which a reasonably prudent person would exercise under like circumstances." *Goold v. Saunders*, 196 Iowa 380, 384, 194 N. W. 227, 229 (1923).

531. See *State v. Mahon*, 3 Harr. 568, 569 (Del. 1839). If there is no resistance and no attempt to escape it is an assault for an officer to strike his prisoner and the prisoner may use reasonable force to defend himself from such an unprivileged blow. *State v. Belk*, 76 N. C. 10 (1877).

532. *Beaverts v. State*, 4 Tex. App. 175 (1878).

533. *State v. Phillips*, 119 Iowa 652, 94 N. W. 229 (1903); *State v. Pugh*, 101 N. C. 737, 7 S. E. 757 (1888); *State v. Yingling*, 44 N. E. 2d 361 (Ohio App. 1942).

534. *Churn v. State*, 184 Tenn. 646, 202 S. W. 2d 345 (1947).

535. 1 BISHOP, *NEW CRIMINAL PROCEDURE* § 159 (2d ed., Underhill, 1913). See annotation on homicide by official action or by officers of justice, 67 L. R. A. 292 (1905).



was committed by someone else or because no such crime had been committed by anyone (as where the supposed victim of homicide was killed by an animal). It will be helpful to consider separately the use of deadly force (a) to stop one in flight, (b) to overcome resistance, (c) in self-defense, (d) to prevent escape and (e) to suppress a riot.

a. *To Stop One in Flight*

If an arrestee armed with a gun is engaged in a "running fight" with his arrester the problem is one of self-defense rather than of mere flight.<sup>536</sup> Hence cases involving this factor will be considered under the head of self-defense. The present topic requires separate attention to misdemeanor and felony cases.

An arrestee who shoots at his arrester or attacks him with a knife or other deadly weapon with intent to kill or injure him, has committed a felony by this very assault,<sup>537</sup> and the arrester may thereafter ignore the original charge and proceed to arrest his assailant for this felony just committed in his presence.<sup>538</sup> Cases involving this factor belong in the group of felony cases even if the original attempt was to arrest for misdemeanor. We consider here only cases in which the attempt is to arrest for a misdemeanor, and for that only.

If an officer, having authority to arrest a misdemeanant, causes his death quite unexpectedly by tripping him, or by some other means neither intended nor likely to cause death or serious harm, he is completely absolved.<sup>539</sup> This is not the use of deadly force. On the other hand shooting at another to wound him is using deadly force even if there is no actual intent to kill.<sup>540</sup>

(1) Misdemeanor

Under the modern common law the use of deadly force is never permitted for the sole purpose of stopping one fleeing from arrest on a mis-

536. "... if he still retained his purpose of resisting to the death, and to make a *running fight*, the officer and his men were not bound to risk their lives by rushing on a desperate man, who still kept his gun in his hands." *State v. Garrett*, 60 N. C. 144, 150 (1863).

537. §§ 10797, 10801.

538. *Hickey v. Commonwealth*, 185 Ky. 570, 215 S. W. 431 (1919); *Collins v. Commonwealth*, 192 Ky. 412, 233 S. W. 896 (1921); *Life & Casualty Co. v. Hargraves*, 169 Tenn. 388, 88 S. W. 2d 451 (1935). An officer sought to arrest the driver of a car for a misdemeanor. The driver tried to run down the officer. This was held to constitute an assault with intent to commit murder which authorized the officer to use deadly force if necessary to make the arrest. *Love v. Bass*, 145 Tenn. 522, 238 S. W. 94 (1921). If an arrestee commits a felony in resisting officers they are authorized to arrest him for that felony even if the warrant under which they started to arrest him was void. *Reichman v. Harris*, 252 Fed. 371 (6th Cir. 1918).

539. "A man who is fleeing from lawful arrest may be tripped up, thrown down, struck with a cudgel and knocked over if it is necessary to do so to prevent his escape, and if he strikes his head on a stone and is killed the police officer is absolved because the man was fleeing to escape lawful arrest and the means taken to stop him were not likely in themselves to cause his death." *King v. Smith*, 17 Man. L. Rep. 282, 13 Can. Cr. Cas. 326, 330 (1907); cf. *State v. Phillips*, 119 Iowa 652, 94 N. W. 229 (1903).

540. "If a man fires at another only intending to wound, but actually causes death, he is guilty of manslaughter at least" (unless justified in shooting). *King v. Smith*, 17 Man. L. Rep. 282, 13 Can. Cr. Cas. 326, 331 (1907).

demeanor charge.<sup>541</sup> This rule applies whether the flight is to avoid an original arrest<sup>542</sup> or to complete an escape after apprehension,<sup>543</sup> whether the arrest is in obedience to a warrant<sup>544</sup> or under general authority to arrest without a warrant,<sup>545</sup> and whether the arrestee is guilty<sup>546</sup> or innocent<sup>547</sup> of the misdemeanor for which the arrest is being made or attempted. As explained by the court: "It is considered better to allow one guilty only of a misdemeanor to escape altogether than to take his life."<sup>548</sup>

If, for example, an officer is unable to take alive one wanted for a violation of the speed law, he is bound to let him go rather than kill him.<sup>549</sup> Deliberately to take the life of such a fleeing misdemeanant is murder.<sup>550</sup> And to shoot at the car with intent to stop the flight by disabling the vehicle has been held such criminal negligence as to support a conviction of manslaughter if homicide results.<sup>551</sup>

Quite obviously the authority of a private person to use deadly force in making an arrest is no greater than that of an officer. Hence even if he is authorized to apprehend for a misdemeanor under the circumstances of a particular case he is not privileged to use deadly force to stop the flight of the arrestee.<sup>552</sup>

541. *Johnson v. State*, 173 Tenn. 134, 114 S. W. 2d 819 (1938); *Human v. Goodman*, 159 Tenn. 241, 18 S. W. 2d 381 (1929); *Reneau v. State*, 70 Tenn. 720 (1879); *Green v. State*, 238 Ala. 143, 189 So. 763 (1939); *Harding v. State*, 26 Ariz. 334, 225 Pac. 482 (1924); *Klinkel v. Saddler*, 211 Iowa 368, 233 N. W. 538 (1930); *Layne v. Commonwealth*, 271 Ky. 418, 112 S. W. 2d 61 (1938); *State v. Salts*, 331 Mo. 665, 56 S. W. 2d 21 (1932); *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757 (1903); *Pearson, The Right to Kill in Making Arrests*, 28 MICH. L. REV. 957, 962 (1930); *Bohlen and Shulman, Arrest With and Without a Warrant*, 75 U. OF PA. L. REV. 485, 501 (1927).

One is not justified in "using a deadly weapon in a deadly manner" to effect an arrest for misdemeanor unless in necessary self-defense. *State v. Towne*, 180 Iowa 339, 348, 160 N. W. 10, 13 (1916). The rule that an officer is not privileged to endanger life to arrest for a misdemeanor makes it unlawful for him to prevent the necessary administration of medical aid to one arrested for misdemeanor. *State ex rel. Morris v. National Surety Company*, 162 Tenn. 547, 39 S. W. 2d 581 (1931).

542. *Handley v. State*, 96 Ala. 48, 11 So. 322 (1892); *Jennings v. Riddle*, 20 Tenn. App. 89, 95 S. W. 2d 946 (E. S. 1935).

543. *Thomas v. Kinkead*, 55 Ark. 502, 18 S. W. 854 (1892); *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757 (1903); *State v. Stancill*, 128 N. C. 606, 38 S. E. 926 (1901).

544. *Thomas v. Kinkead*, 55 Ark. 502, 18 S. W. 854 (1892); *State v. O'Neil, Houst. Cr. 468* (Del. Ct. Oyer & Ter. 1875); *State v. Sigman*, 106 N. C. 728, 11 S. E. 520 (1890).

545. *Klinkel v. Saddler*, 211 Iowa 368, 233 N. W. 538 (1930).

546. *State v. O'Neil, Houst. Cr. 468* (Del. Ct. Oyer & Ter. 1875).

547. *State v. Boggs*, 87 W. Va. 738, 106 S. E. 47 (1921).

548. *Reneau v. State*, 70 Tenn. 720, 721 (1879); see *Smith v. State*, 127 Iowa 534, 537, 103 N. W. 944, 945 (1905).

549. An officer is not justified in shooting to stop one who is exceeding the speed law, even if he cannot be otherwise taken, and evidence is not admissible to show that this is the customary method adopted by officers to stop speeding in that community. *People v. Klein*, 305 Ill. 141, 137 N. E. 145 (1922).

550. *Hill v. Commonwealth*, 239 Ky. 646, 40 S. W. 2d 261 (1931); *Collett v. Commonwealth*, 269 Ky. 346, 107 S. W. 2d 280 (1937).

551. *Harding v. State*, 26 Ariz. 334, 225 Pac. 482 (1924). Where the officer "aimed low, for the purpose of merely disabling him, but, owing to a sudden descent in the ground, the shot took effect in the back instead of the leg" and caused the death of the one to be arrested, the case will be treated the same as if the killing was intentional. *United States v. Clark*, 31 Fed. 710, 712 (C. C. E. D. Mich. 1887).

552. *Handley v. State*, 96 Ala. 48, 11 So. 322 (1892). The early common law of

In a famous English case it was held that an officer who shot one supposed by him to be a fleeing misdemeanor had exceeded his lawful privilege and was guilty of shooting with intent to do grievous bodily harm even if, unknown to the officer, the one he shot at was in fact a fleeing felon.<sup>553</sup>

The statute reads: "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."<sup>554</sup> The officer must not be misled by the wording of this section. It is interpreted in the light of the common law. There is a difference between killing and arresting. Under some circumstances an officer is privileged to kill if he is unable to arrest, as will be pointed out later, but they involve arrest for felony. The court has held that this statute does not permit the officer to shoot for the sole purpose of stopping the flight of one wanted for misdemeanor.<sup>555</sup>

## (2) Felony

Firmly established in the early common law of England was the privilege to kill a fleeing felon if he could not otherwise be taken.<sup>556</sup> This privilege was extended to the private person as well as to the officer,<sup>557</sup> and was not dependent upon the existence of a warrant for the felon's apprehension.<sup>558</sup> No exception was recognized,<sup>559</sup> for a reason not difficult to find. In com-

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England recognized an exception, and in one type of case deadly force was permitted to stop a fleeing misdemeanor who could not otherwise be taken. This was where the fleeing wrongdoer had maliciously inflicted a dangerous wound and the reason was "that the offense may turn out to be felony" by the wounds later proving to be fatal. 1 EAST P. C. \*302. Under the statutes such wounding is a felony even if it does not prove fatal (§§ 10778, 10801) and hence this exception has disappeared. It has been suggested by way of *dictum* that there may be "some exceptions, as in cases of riot, mob violence, etc." State v. Smith, 127 Iowa 534, 537, 103 N. W. 944, 945 (1905). These are not exceptions to the rule here under consideration. A riot requires no more than three persons. See Douglass v. State, 14 Tenn. 525, 526 (1834). And three are probably insufficient for a "mob"; but "mob violence" in the sense of unlawful conduct by a mob "in a violent and turbulent manner, to the terror of the people" is certainly a riot. 1 HAWK. P. C., c. 65, § 1 (6th ed., Leach, 1788). If a riot is of such a nature that it cannot be subdued by mild measures, the menace to the public is so great that *any force* necessary to terminate it may be used. 4 BL. COMM. \*147. This, however, is to end a present menace. If the menace has ceased and the only present purpose is to stop the flight of one or more of the offenders, deadly force may not be used if the riot did not amount to felony. See Head v. Martin, 85 Ky. 480, 485, 3 S. W. 622, 623 (1887).

553. Regina v. Dodson, 4 Cox C. C. 360 (1850); cf. Collett v. Commonwealth, 296 Ky. 267, 176 S. W. 2d 893 (1944).

554. § 11539.

555. Johnson v. State, 173 Tenn. 134, 114 S. W. 2d 819 (1938); Durham v. State, 199 Ind. 567, 159 N. E. 145 (1927). "Except in self-defense, an officer cannot resort to the extremity of killing, or shedding blood, in arresting or in preventing the escape of one charged with an offense less than felony, even though the offender cannot be taken otherwise." Human v. Goodman, 159 Tenn. 241, 243-44, 18 S. W. 2d 381 (1929); see Reneau v. State, 70 Tenn. 720, 721-22 (1879).

556. "If a felony be committed and the felon fly from justice, . . . it is the duty of every man to use his best endeavors for preventing an escape; and if in the pursuit the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable." 1 EAST P. C. \*298.

557. *Ibid.*; 2 HALE P. C. \*118; 1 HAWK. P. C., c. 28, § 11 (6th ed., Leach, 1788). And see Suell v. Derricott, 161 Ala. 259, 49 So. 895 (1909).

558. 4 BL. COMM. \*292-93.

559. See the citations *supra* to Hale, Hawkins, East and Blackstone.

mitting the felony, the felon had forfeited his life under the original common law,<sup>560</sup> and the "extirpation was but a premature execution of the inevitable judgment."<sup>561</sup>

This reason would not apply to a person fleeing from a charge of felony of which he was in fact innocent, and the rule was not quite the same in such a case. If the arrest was being made by virtue of a warrant charging the commission of a felony and the person named therein fled so that he could not otherwise be overtaken the use of deadly force was privileged by an officer or by a private person.<sup>562</sup> If the arrest was on reasonable suspicion of felony thought to have been committed by the arrestee, who was in fact innocent, an officer was privileged to use deadly force if necessary to overtake the arrestee,<sup>563</sup> but a private person was not.<sup>564</sup> Arrest by a private person on reasonable suspicion of felony was unlawful even without the use of deadly force if in fact no felony had been committed by anyone, no matter how misleading the appearances may have been. If a felony had been committed and the particular arrestee was innocent thereof, a private person was privileged to arrest him if he believed in his guilt and had good ground for this belief, but deadly force was not privileged.<sup>565</sup> In other words, according to the early common law, a *private person* was never privileged to use deadly force merely to stop the flight of one he was seeking to arrest without a warrant, if that one was in fact innocent.<sup>566</sup>

(i) *Seriousness of the Felony*—Elimination of most felonies from the category of capital crimes, coupled with inclusion in the felony list of numerous misdeeds never punishable by death, has caused some to doubt the propriety of continuing the ancient rule which permitted *any* fleeing felon to be killed if he could not otherwise be stopped.<sup>567</sup> Limitation of such force for this purpose to capital offenses alone would be too restrictive and has not been suggested; the question has been whether it should be confined to the so called "dangerous" felonies, such as arson, burglary, kidnaping, manslaughter, mayhem, murder, rape, robbery and all types of *felonious* as-

560. See *Petrie v. Cartwright*, 114 Ky. 103, 109, 70 S. W. 297, 299 (1902).

561. Note, *Legalized Murder of a Fleeing Felon*, 15 VA. L. REV. 582, 583 (1929).

562. "And therefore the Sherife, bailife, or any other, that hath a Warrant to arrest a man indicted of Felonie, may justify the killing of him, if otherwise they cannot take him." LAMBARD, *EIRENARCHA* \*238. Hale makes a similar statement without mention of indictment. 2 HALE P. C. \*118. Hale first speaks only of an officer, but says later: "But there must be these cautions. 1. He must be a lawful officer, or there must be *hue* and *cry*, or there must be a lawful warrant."

563. 2 HALE P. C. \*85-86, 93, 118.

564. *Id.* at \*78, 82-83.

565. *Ibid.*

566. "Arrest without a warrant" is used in the text to mean without any *special* authority to arrest. One who joined in the *hue* and *cry*, for example, had special authority and was privileged to use deadly force if this was necessary to stop the flight of the arrestee. *Id.* at \*101. "Hue and cry is the old common law process after felons. . . ." *Id.* at \*98.

567. *Regina v. Murphy*, 1 Cr. & Dix 20 (Ireland, 1839); *State v. Bryant*, 65 N. C. 327 (1871); *Reneau v. State*, 70 Tenn. 720 (1879).

sault.<sup>568</sup> In this connection it should be borne in mind that a felony otherwise entitled to the milder classification becomes a dangerous felony if the manner of its commission creates a likelihood of death or great bodily injury; whereas one of the typical dangerous felonies remains in this category regardless of the circumstances of the particular offense.<sup>569</sup> Burglary, kidnaping and robbery, for example, are dealt with as *dangerous* felonies even if the perpetration in the particular case seems reasonably free from human risk.<sup>570</sup> Moreover, the *felonious* breaking into a store, shop or other building belongs in this category whether the statute deals with it as a "degree" of burglary or provides the penalty without the use of this label.<sup>571</sup>

References to a change of the original rule sometimes suggest a limitation to cases of dangerous felonies by legislative enactment,<sup>572</sup> and sometimes take the position that this limitation has already been accomplished by the gradual evolution of the common law itself.<sup>573</sup> Cases venturing the latter suggestion have usually involved arrest by private persons,<sup>574</sup> and such a limitation on the privilege of a private person who is acting merely "on his own authority" seems free from question. The law does not permit the use of deadly force for the mere purpose of *preventing* a non-dangerous felony,<sup>575</sup> and a private person cannot defeat this restriction merely by saying his purpose is arrest rather than prevention.

The American Law Institute has taken the position that no one, officer or private person, with or without a warrant, is privileged to use deadly force merely to stop the flight of one whose arrest is sought for a non-dangerous felony.<sup>576</sup> The authorities seem not to support this position as far as it concerns arrest by peace officers.<sup>577</sup> Time and again the privilege of an officer to

568. The American Law Institute has limited the use of deadly force for the purpose of stopping a fleeing felon to arrests for "treason or for a felony which normally causes or threatens death or serious bodily harm, or which involves the breaking and entry of a dwelling place, . . ." RESTATEMENT, TORTS § 131(a) (1934).

569. *Id.* at comment g.

570. *Ibid.*

571. The American Law Institute avoids a position on this point by means of a caveat. *Id.* under § 131. But human experience indicates a very great risk of death or great bodily injury from those who perpetrate this type of offense and the cases show no inclination to treat it as non-dangerous.

572. "And we may add that it may be a question worthy of consideration whether the law ought not to be modified in respect to the lower grade of felonies, especially in view of the large number of crimes of this character created by comparatively recent legislation, whether as to these even escape would not be better than to take life." *Reneau v. State*, 70 Tenn. 720, 721-22 (1879). See Legis., *Officer's Right to Use Deadly Force to Arrest Fleeing Arrestee*, 24 IOWA L. REV. 154 (1938).

573. RESTATEMENT, TORTS § 131 (1934).

574. *State v. Bryant*, 65 N. C. 327 (1871); *Regina v. Murphy*, 1 Cr. & Dix 20 (Ireland 1839).

575. One cannot kill merely to prevent a thief from taking away his horse, even if the offense is a felony. *Storey v. State*, 71 Ala. 329 (1882).

576. RESTATEMENT, TORTS § 131, and illustration 1 (1934). This position was taken in reliance upon dicta and upon the analogy drawn from limitations placed upon the privilege to kill to prevent a felony. *Bohlen and Shulman, Arrest With and Without a Warrant*, 75 U. OF PA. L. REV. 485, 494-504 (1927).

577. *Reneau v. State*, 70 Tenn. 720 (1879) suggests such a limitation but only in

use deadly force if necessary to stop a fleeing felon has been announced by the American cases without mention of any limitation based upon the grade of felony involved,<sup>578</sup> and often it has been in a case in which the apprehension was for a felony of the non-dangerous grade, such as a violation of military discipline,<sup>579</sup> a violation of the prohibition law<sup>580</sup> or larceny.<sup>581</sup> Since this position was first suggested by the Institute at least two cases have expressly repudiated any such limitation upon the privilege of an officer.<sup>582</sup> But any statement of the Institute carries too much weight to be ignored, and the next case to be decided may adopt the limitation mentioned. Hence the only safe advice for a peace officer is to avoid the use of deadly force if the only purpose is to stop the flight of one whose arrest is sought for a non-dangerous felony.

(ii) *Innocence of Arrestee*—Innocence of the arrestee may have an important bearing upon the lawfulness of the arrest itself, particularly if the arrest is by a private person and the innocence of the other is due to the fact that no felony has actually been committed by anyone. This problem must be considered in the light of principles previously discussed because obviously there is no privilege to use deadly force in order to accomplish an *unlawful* arrest.<sup>583</sup> The question here is whether the use of deadly force may be unlawful by reason of innocence of the arrestee, although the arrest itself was

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the form of a proposal that the law probably should be modified in this respect. *Caldwell v. State*, 41 Tex. 86 (1874), is based upon an interpretation of the Texas statute. A number of cases denying the officer's privilege to use deadly force in the particular arrest involve situations in which the arrest was undertaken without a warrant, on suspicion that seems not to have been supported by good grounds, and where no felony had in fact been committed. See *Dixon v. State*, 101 Fla. 840, 132 So. 684 (1931); *Young v. Amis*, 220 Ky. 484, 295 S. W. 431 (1927); *Ex parte Finney*, 21 Okla. Cr. 103, 205 Pac. 197 (1922); *Commonwealth v. Greer*, 20 Pa. Co. 535 (1898). Compare the following cases in which the officer acted without a warrant but on "reasonable" suspicion. *People v. Kilvington*, 104 Cal. 86, 37 Pac. 799 (1894); *Petrie v. Cartwright*, 114 Ky. 103, 70 S. W. 297 (1902). In *Petrie v. Cartwright*, *supra*, probably the most cited case for the position taken by the Institute, the point was not really involved. The officer had reason to believe a dangerous felony had been committed and the reason for denying him the privilege to use deadly force was that he acted upon suspicion and no felony had in fact been committed. The position of the case seems unsound, but it should not even be cited on the "non-dangerous" felony point.

578. *Life & Casualty Co. v. Hargraves*, 169 Tenn. 388, 88 S. W. 2d 451 (1935); *Scarborough v. State*, 168 Tenn. 106, 76 S. W. 2d 106 (1934); *People v. Adams*, 85 Cal. 231, 24 Pac. 629 (1890); *Dilger v. Commonwealth*, 88 Ky. 550, 560, 11 S. W. 651 (1889); *Hendricks v. Commonwealth*, 163 Va. 1102, 178 S. E. 8 (1935).

579. *United States v. Clark*, 31 Fed. 710 (C. C. E. D. Mich. 1887).

580. *Ex parte Warner*, 21 F. 2d 542 (N. D. Okla. 1927).

581. *Johnson v. Chesapeake and O. Ry. Co.*, 259 Ky. 789, 83 S. W. 2d 521 (1935); *Jackson v. State*, 66 Miss. 89, 5 So. 690 (1888).

582. *Stinnett v. Virginia*, 55 F. 2d 644, 646-47 (4th Cir. 1932); *Thompson v. Norfolk and W. Ry.*, 116 W. Va. 705, 182 S. E. 880 (1935). *Stinnett v. Virginia*, *supra*, was decided prior to the adoption of the *Torts Restatement*, but the Institute had made a similar suggestion in another connection, and this is expressly referred to and held not to represent the common law. The other case cited did not mention the Institute, but referred to the case of *State v. Bryant*, 65 N. C. 327 (1871), with the comment: "But such is not the common law rule" (at page 711).

583. *O'Connor v. State*, 64 Ga. 125 (1879).

duly authorized and was for an offense so serious as normally to permit the use of deadly force if necessary.

The view of the early common law of England was that innocence of the arrestee would produce this result if the arrestee was a private person and was acting without a warrant, but would not do so if the arrest was by virtue of a warrant or if the arrestee was a peace officer with lawful authority to make the arrest without a warrant.<sup>584</sup> *American* cases may be found suggesting that the private arrestee runs this risk,<sup>585</sup> and some even suggest that an apprehending officer without a warrant must act at his peril in this regard.<sup>586</sup> It seems well established that the degree of permitted force is not affected by the innocence of an arrestee apprehended by virtue of a warrant,<sup>587</sup> and the sound view is that this is true in every case in which the arrest itself is duly authorized,<sup>588</sup> except that if the arrest is on reasonable suspicion of felony a greater likelihood of the arrestee's guilt is needed for the use of deadly force than for an apprehension by means neither intended nor likely to cause death or great bodily harm.<sup>589</sup> As stated by one authority, an arrestee who is contemplating the use of deadly force "has not the same latitude of discretion

584. 2 HALE P. C. \*119.

585. See *State v. Rutherford*, 8 N. C. 457, 458-59 (1821).

586. *Young v. Amis*, 220 Ky. 484, 295 S. W. 431 (1927). "The defendant Amis therefore had no right to shoot the plaintiff while he was in flight, unless the plaintiff had in fact committed a felony." 220 Ky. at 487, 295 S. W. at 432.

587. LAMBARD, *EIRENARCHA* \*238; 2 HALE P. C. \*118; 1 HAWK, P. C., c. 28, § 12 (6th ed., Leach, 1788). See *Dixon v. State*, 101 Fla. 840, 851-52, 132 So. 684, 688 (1931). Even cases which suggest some other result where the arrest is without a warrant, indicate the innocence of the arrestee would be unimportant if the arrest was in obedience to a warrant. See, for example, *Conrady v. People*, 5 Park. Cr. R. 234 (N. Y. 1862).

"But if a peace-officer, or indeed any other person specially delegated, have a warrant from a proper magistrate for the apprehending of B. *by name*, upon a charge of felony; or if B. stand indicted for felony; . . . in these cases if B. though innocent fly, . . . and . . . be killed by such peace-officer or special bailiff, or his assistants . . . the person so killing will be indemnified. For these persons were . . . in the discharge of a duty required from them by law, and subject to punishment in case of a wilful neglect of it." 1 EAST P. C. \*299-300. See also 1 HALE P. C. \*490.

588. *Vaccaro v. Collier*, 38 F. 2d 862 (D. Md. 1930); *Union Indemnity Co. v. Webster*, 218 Ala. 468, 118 So. 794 (1928); *McKeon v. National Casualty Co.*, 216 Mo. App. 507, 270 S. W. 707 (1925). The American Law Institute does not include guilt of the arrestee as a requisite for the use of deadly force in any case in which the arrest itself is lawfully authorized. RESTATEMENT, TORTS § 131 (1934). Cases which seem to stand for a contrary view can usually be explained on the ground that the arrest itself was unlawful, as where the innocence of the arrestee is coupled with the fact that the arrestee had no reasonable grounds to believe him guilty. This is the explanation of *O'Conner v. State*, 64 Ga. 125 (1879); *McCrackin v. State*, 150 Ga. 718, 105 S. E. 487 (1920); and *Commonwealth v. Greer*, 20 Pa. Co. 535 (1898).

589. "The authority of an arresting officer to use force in making arrests of known persons for felony with a warrant is very different from that which he has in making arrests of unidentified persons without a warrant. In the former case, having due regard to the safety of others, he may use such force as is reasonably necessary to accomplish the arrest, even to the wounding of the felon, while in the latter case he acts upon his own reasonable ground of belief, and is required to exercise caution, and, in the event of mistaken identity, if injury results, he may be liable for any lack of reasonable and due caution in identifying the person as well as for any injury he may inflict upon such person or others as a result of his efforts." *Dixon v. State*, 101 Fla. 840, 851-52, 132 So. 684, 688 (1931).

which is permitted to him in determining whether it is necessary to use force which is intended or likely to cause less serious consequences."<sup>590</sup>

(iii) *Requirement of Necessity*—No matter how grave the felony, or how guilty the particular arrestee, no arrestee is authorized by law to appoint himself an arbitrary executioner. No arrestee, whether officer or private person, with or without a warrant, is privileged to use deadly force merely because he would rather kill than capture.<sup>591</sup> Lord Hale cautions: "It must be a case of necessity,"<sup>592</sup> and a very common form of expression limits the privilege to use deadly force to stop the flight of an arrestee to cases in which "he cannot otherwise be taken."<sup>593</sup> As said by the Tennessee Court: "If with diligence and caution the prisoner might otherwise be taken or held, the officer will not be justified for the killing, even though the prisoner may have committed a felony."<sup>594</sup>

This, in spite of an occasional indication to the contrary,<sup>595</sup> means apparent necessity rather than actual necessity.<sup>596</sup> It must have appeared to the arrestee "in the exercise of a reasonable discretion" to be necessary.<sup>597</sup> He must have believed the deadly force to be necessary and have had good

590. RESTATEMENT, TORTS § 131, comment f (1934). The quotation was with reference to the need for the force used rather than the grounds for belief of the arrestee's guilt of felony, but the limitation seems applicable to both.

591. *Scarborough v. State*, 168 Tenn. 106, 76 S. W. 2d 106 (1934). "An officer has no absolute right to kill, either to take a prisoner, or prevent his escape, even in felonies, unless reasonably necessary. . . ." *Human v. Goodman*, 159 Tenn. 241, 18 S. W. 2d 381 (1929). See also *Love v. Bass*, 145 Tenn. 522, 529, 238 S. W. 94, 96 (1921); *Reneau v. State*, 70 Tenn. 720, 721 (1879); *Suell v. Derricott*, 161 Ala. 259, 49 So. 895 (1909).

592. 2 HALE P. C. \*118. And see *Rawlings v. Commonwealth*, 191 Ky. 401, 406, 230 S. W. 529, 531 (1921); *Lamma v. State*, 46 Neb. 236, 64 N. W. 956 (1895); *Commonwealth v. Micuso*, 273 Pa. 474, 117 Atl. 211 (1922). "So it would seem, that, at any rate, there ought to be pursuit, or a certainty of escape, before killing could be justified—else how does it appear that he 'could not be otherwise arrested?'" *State v. Bryant*, 65 N. C. 327, 329 (1871).

593. *People v. Lillard*, 18 Cal. App. 343, 346, 123 Pac. 221, 222 (1912); 1 HAWK. P. C., c. 28, § 12 (6th ed., Leach, 1788); LAMBARD, *ETREARCHA* \*238 ("... if otherwise they cannot be taken. . ."); 2 HALE P. C. \*119 ("... cannot otherwise be taken. . ."); see *Scarborough v. State*, 168 Tenn. 106, 110, 76 S. W. 2d 106, 107 (1934).

594. *Love v. Bass*, 145 Tenn. 522, 529-30, 238 S. W. 94, 96 (1921).

595. The most pronounced insistence upon "positive necessity" to the exclusion of a belief of necessity based upon reasonable grounds is in *Conraddy v. People*, 5 Park. Cr. R. 234, 240 (N. Y. 1862). But this was an ill-considered case by a court not of last resort. "He cannot kill, except in the case of actual necessity, and whether or not such necessity exists is a question for the jury." *Mylett's Adm'r v. Burnley*, 163 Ky. 277, 282, 173 S. W. 759, 761 (1915). In this case, however, a judgment in favor of the officers was affirmed.

596. *People v. Adams*, 85 Cal. 231, 24 Pac. 629 (1890); *Collins v. Commonwealth*, 192 Ky. 412, 233 S. W. 896 (1921); *Young v. Amis*, 220 Ky. 484, 486, 295 S. W. 431, 432 (1927); 4 BL. COMM. \*180 ("... is necessary, or appears to him to be necessary. . ."). And see *Collett v. Commonwealth*, 296 Ky. 267, 176 S. W. 2d 893 (1944).

"The killing must, of course, be apparently necessary, for one is not justified in taking human life if there be any other effective way of effecting the arrest; . . ." *State v. Smith*, 127 Iowa 534, 539, 103 N. W. 944, 946 (1905); *Hendricks v. Commonwealth*, 163 Va. 1102, 1109, 178 S. E. 8, 11 (1935). "There is no evidence upon the question of whether or not the firing of pistols was reasonably necessary." *Scarborough v. State*, 168 Tenn. 106, 110, 76 S. W. 2d 106, 107 (1934).

597. *Johnson v. Chesapeake & O. Ry.*, 259 Ky. 789, 796, 83 S. W. 2d 521, 524, (1935); see *Union Indemnity Co. v. Webster*, 218 Ala. 468, 477, 118 So. 794, 802 (1928).



grounds for this belief.<sup>598</sup> Or, in the carefully worded statement of one authority, deadly force is privileged for this purpose (when duly authorized in other respects) if the arrestor "reasonably believes that the arrest cannot otherwise be effected."<sup>599</sup>

The privilege to use deadly force in certain cases for the purpose of stopping the flight of an arrestee "rests upon the idea that felons ought not to be at large."<sup>600</sup> Hence the question is whether such force is necessary to effect the present arrest, rather than some future one.<sup>601</sup> No doubt an arrestor will be required to be patient if the success of the present arrest will not be imperiled thereby, and to delay the actual moment of apprehension rather than use deadly force on the instant.<sup>602</sup> But when the arrestee is in flight the choice is usually between the use of certain force now and the abandonment of the present effort. Whenever such choice is presented "the possibility of the fugitive being found and apprehended subsequently need not be considered."<sup>603</sup>

An additional point must be noted. Even when an arrestor is privileged to use deadly force as far as the arrestee himself is concerned, it may be necessary for him to withhold his fire for the safety of innocent bystanders. If an officer shoots at a fleeing felon under such circumstances as obviously to create an *unreasonable* risk of death or great bodily harm to others, he will be liable for any injury he may inflict upon an innocent person.<sup>604</sup>

In this connection the importance of the arrest must be compared with the risk to others. What is reasonable or unreasonable depends upon all of the

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598. "Certainly, proof of absolute necessity was not required. The law exacted no more from defendant than that in what he did he employed no more force in effecting the arrest than to him, acting as an ordinarily prudent person, would, under like circumstances, seem reasonably and apparently necessary to effect the arrest of deceased." *State v. Phillips*, 119 Iowa 652, 656, 94 N. W. 229, 230 (1903).

599. RESTATEMENT, TORTS § 131 (1934).

600. *Petrie v. Cartwright*, 114 Ky. 103, 70 S. W. 297, 299 (1902); *People v. Klein*, 305 Ill. 141, 146, 137 N. E. 145, 148 (1922) ("... for the reason that the safety of the public is endangered while such felon is at large. . ."); *Holloway v. Moser*, 193 N. C. 185, 187, 136 S. E. 375, 376 (1927) ("... the safety and security of society require the speedy arrest and punishment of a felon.").

601. "A person has the right to kill, if necessary to effectuate the immediate arrest of a felon. It is immaterial that at a later time the felon could probably be arrested without resort to killing." *Pearson, The Right to Kill in Making Arrests*, 28 MICH. L. REV. 957, 966 (1930). "He is not bound to put off the arrest until a more favorable time." *Holloway v. Moser*, 193 N. C. 185, 188, 136 S. E. 375, 377 (1927). And see *State v. McMahan*, 103 S. C. 379, 9 S. E. 489 (1889); *North Carolina v. Gosnell*, 74 Fed. 734 (C. C. W. D. N. C. 1896); *King v. Smith*, 17 Man. L. Rep. 282, 13 Can. Cr. Cas. 326 (1907).

602. See *Scarborough v. State*, 168 Tenn. 106, 109, 76 S. W. 2d 106, 107 (1934).

603. *King v. Smith*, 17 Man. L. Rep. 282, 13 Can. Cr. Cas. 326, 331 (1907).

604. Though a peace officer is privileged to shoot if necessary to stop a fleeing robber, "if, however, the shooting were done in a public place, where the officer understood or should have known people . . . were likely to pass, the act might constitute such negligence as to render the officer civilly liable for any injury that he might inflict upon an innocent person." *Askay v. Maloney*, 85 Ore. 333, 339, 166 Pac. 29, 31 (1917).

circumstances of the particular case; and the fact of the attempted arrest is itself one of the most important circumstances.

b. *To Overcome Resistance*

One outstanding difference between resistance and flight, insofar as it concerns the degree of force used by the arrestee, is that the former may create a problem of self-defense. Before turning to that problem it is wise to speak of the force which may be used to overcome resistance as such—as distinguished from *defensive* force. As pointed out in the beginning, if the arrest is otherwise lawful, any degree of *non*-deadly force which is necessary, or reasonably appears to be necessary, to overcome resistance by the arrestee, may be employed for this purpose. An additional generalization may be offered here. Whenever the circumstances of the arrest are such as to authorize the use of deadly force if necessary to stop the arrestee in flight, they will authorize the use of such force if necessary to overcome resistance offered by him.<sup>605</sup>

This makes unnecessary a reconsideration of the various problems discussed in connection with flight,—such as the difference between felony and misdemeanor, the seriousness of the particular felony, the innocence of the arrestee, and the requirement of “necessity.” It leaves one important question: If the arrestee encounters resistance which does not threaten him with death or great bodily harm, will he ever be permitted to use deadly force if necessary to overcome this resistance and complete the arrest if the circumstances are such that he could not be permitted to use deadly force if necessary to stop the arrestee in flight? In other words, is there greater privilege to use deadly force in overcoming resistance to arrest than in stopping flight from arrest, on any ground other than self-defense? The common law gives a negative answer to this question,<sup>606</sup> although an occasional suggestion to the contrary may be found.<sup>607</sup>

605. See, for example, RESTATEMENT, TORTS § 131 and comments thereto, particularly comment *e* (1934).

606. *Loveless v. Hardy*, 201 Ala. 605, 79 So. 37 (1918); *Klinkel v. Saddler*, 211 Iowa 368, 233 N. W. 538 (1930); *Layne v. Commonwealth*, 271 Ky. 418, 112 S. W. 2d 61 (1938); *Grohoske v. State*, 124 Tex. Cr. 338, 61 S. W. 2d 847 (1933); see *Smith v. State*, 59 Ark. 132, 139, 26 S. W. 712, 714 (1894); *People v. Klein*, 305 Ill. 141, 146, 137 N. E. 145, 148 (1922). “It is immaterial whether the force is used or threatened to prevent flight or to overcome or prevent resistance.” RESTATEMENT, TORTS § 131, comment *e* (1934). If death should unexpectedly result from force neither intended nor likely to cause death or serious bodily harm the officer is excused. *State v. Phillips*, 119 Iowa 652, 94 N. W. 229 (1903).

607. *Hatfield v. Commonwealth*, 248 Ky. 573, 59 S. W. 2d 540 (1933); *State v. Ford*, 344 Mo. 1219, 130 S. W. 2d 635 (1939); *State v. Dunning*, 177 N. C. 559, 98 S. E. 530 (1919).

“If he have a warrant for any crime, from the highest to the lowest, whether a felony or a misdemeanor, and the party resist, and the constable have no means of making him amenable except by killing him, he is justified in so doing. But the case of flight is different from resistance. If the warrant be for felony, flight is tantamount to resistance, and the flying felon may be justifiably killed, if he cannot be otherwise secured. In cases of misdemeanor, resistance will justify killing, though flight will not; for in such cases the law considers it better, that the accused should escape,

The Tennessee statute seems to make no change in this regard. The section reads: "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest."<sup>608</sup> This couples flight and resistance in the same clause, and the court has held that this wording does *not* permit the use of deadly force merely to stop the flight of a misdemeanor who cannot be taken otherwise.<sup>609</sup> Moreover, the court has said: "Except in self-defense, an officer cannot resort to the extremity of killing, or shedding blood, in arresting or in preventing the escape of one charged with an offense less than felony, even though the offender cannot be taken otherwise."<sup>610</sup>

Hence if an officer is trying to bring in a 300-pound misdemeanor who threatens no harm to the officer but merely refuses to accompany him, and the officer has not learned holds which will overcome such passive resistance without risk of death or great bodily harm, he will have to secure help in making the arrest. He is not privileged to shoot the other.<sup>611</sup>

To repeat what was said in another connection, one whose arrest is sought for a misdemeanor may make a *felonious* assault upon the officer in resistance. Whenever this is true the original charge may be ignored for the time being and the officer may proceed to arrest for this dangerous felony committed in his presence. And if necessary to effect this arrest he may use deadly force even if he is not himself in danger at the time such force is used.<sup>612</sup>

To summarize: As far as the privilege to use deadly force is concerned there is no important difference between flight and resistance except that resistance may (a) result in the commission of a felony by one originally

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than that a life should be taken." *Rex v. Finnerty*, 1 Cr. & Dix 167, n. (Ireland, 1830). This is dictum as to the misdemeanor since the person to be arrested was charged with a felony. A number of cases which seem to authorize deadly force to overcome resistance on the part of one being arrested for a misdemeanor, were actually self-defense cases. *Pearson, The Right to Kill in Making Arrests*, 28 MICH. L. REV. 957 (1930).

608. § 11539.

609. *Johnson v. State*, 173 Tenn. 134, 114 S. W. 2d 819 (1938).

610. *Human v. Goodman*, 159 Tenn. 241, 243-44, 18 S. W. 2d 381 (1929); *see Reneau v. State*, 70 Tenn. 720, 721-22 (1879).

611. A case in Hawaii holds that under the statute there an officer with a warrant is authorized to use deadly force if necessary to overcome resistance, even if the offense charged in the warrant is a misdemeanor. *Territory v. Machado*, 30 Haw. 487 (1928). The court might also interpret its statute so as to permit deadly force, if necessary, to stop a misdemeanor in flight from such an arrest.

612. *Hickey v. Commonwealth*, 185 Ky. 570, 215 S. W. 431 (1919); *Love v. Bass*, 145 Tenn. 522, 234 S. W. 94 (1922). *See also State v. Smith*, 127 Iowa 534, 103 N. W. 944 (1905). If the arrest is for an offense which is only a misdemeanor, neither the officer nor his assistant has the privilege to shoot or wound the fugitive merely to stop him in flight; but if the accused shoots at the officer or his assistant when they are properly seeking to make the arrest, the other has now committed a felony in their presence, and the officer and his assistant may use such force in endeavoring to capture the offender as may be necessary for that purpose, even to the taking of his life. Neither the officer nor his assistant would have any such privilege if they unlawfully forced the other to shoot in self-defense. *Rawlings v. Commonwealth*, 191 Ky. 401, 230 S. W. 529 (1921).

wanted only on a misdemeanor charge, or (b) create a problem of self-defense.

*c. In Self-Defense*

Where a lawful apprehension is resisted by force, the arrestor's privilege of self-defense is too clear for question.<sup>613</sup> And he is privileged to use deadly force if this is necessary, or reasonably appears to be necessary, to save himself from death or great bodily harm,—irrespective of the grade of the offense for which the arrest is being attempted.<sup>614</sup> Furthermore, one attempting to make a lawful arrest is never required to abandon the attempt where he has a choice between this abandonment and the use of deadly force in self-defense.<sup>615</sup> "The officer must of necessity be the aggressor; his mission is not accomplished when he wards off the assault; he must press forward and accomplish his object; he is not bound to put off the arrest until a more favorable time. Because of these duties devolved upon him the law throws around him a special protection."<sup>616</sup> Hence he may "freely and without retreating repel force by force."<sup>617</sup> The cases frequently speak of this in terms of the privilege of an *officer*, but this is because such a case almost always involves an officer. As a matter of law even a private person who is attempting to make a lawful arrest and is endangered by the unlawful resistance of the arrestee, may use deadly force if this is necessary, or reasonably appears to be necessary, to save himself from death or great bodily injury during a continuation of this attempt to make the arrest, although he could safely avoid the necessity of using such defensive force by giving up the attempt.<sup>618</sup> In one case the arrestor may have no choice except to kill or be killed. In another he may be in a position either to (1) kill, (2) be killed, or (3) abandon the attempt to make the arrest. He has the same privilege to use deadly force in his own defense in either type of case.<sup>619</sup>

613. United States *ex rel.* Roberts v. Jailer, 26 Fed. Cas. 571, No. 15, 463 (C. C. D. Ky. 1867); Smith v. State, 59 Ark. 132, 26 S. W. 712 (1894); Rex v. Compton, Lib. Ass. 22, f. 97, pl. 55 (1348); FOSTER, CROWN LAW \*321; see People v. Klein 305 Ill. 141, 137 N. E. 145, 149 (1922).

614. RESTATEMENT, TORTS § 65 and § 131, comment *d* (1934).

615. 1 HALE P. C. \*494; 2 *id.* \*117-18; Clements v. State, 50 Ala. 117 (1874); Smith v. State, 59 Ark. 132, 26 S. W. 712 (1894); see Dyson v. State, 28 Ala. App. 549, 552, 189 So. 784, 786 (1939); Stevens v. Commonwealth, 124 Ky. 32, 43, 98 S. W. 284, 287 (1906); RESTATEMENT, TORTS § 65 and § 131, comment *d* (1934).

616. State v. Dierberger, 96 Mo. 666, 675, 10 S. W. 168, 171 (1888); and see State v. Ford, 344 Mo. 1219, 1225, 130 S. W. 2d 635, 638-39 (1939). A peace officer making an arrest for a misdemeanor committed in his presence, who is met with resistance, is not obliged to retire in order to avoid the conflict, but it is his duty to press forward and make the arrest, using all the force necessary to accomplish that purpose. People v. Hardwick, 204 Cal. 582, 269 Pac. 427 (1928).

617. FOSTER, CROWN LAW \*321. See also Birt v. State, 156 Ala. 29, 37, 46 So. 858, 861 (1908); Tuck v. Beliles, 153 Ky. 848, 850, 156 S. W. 883, 884 (1913).

618. RESTATEMENT, TORTS § 65 and § 131, comment *d* (1934).

619. "In this case it was the duty of the deputy United States marshal to serve these warrants. While he would not have been justified in shooting in order to prevent their escape had they taken flight, he was by no means compelled to abandon his efforts because they commenced firing upon him. It was not only his privilege but his duty to overcome such resistance, and the taking of life necessary

The law does not require an arrestor to assume an unreasonable risk even if he is an officer acting in obedience to a warrant which commands the arrest. Rather than press on and incur almost certain death or great bodily injury, the officer may abandon the present attempt to make the arrest as a precaution for his own safety. In doing this he is guilty of no dereliction. In fact, the interest of the state in human life includes the life of this officer as well as of anyone else, and it is part of his duty not to throw away his life needlessly. Because of this duty, as well as the general privilege of self-defense, an officer seeking to apprehend an armed offender is not bound to hold his fire until the arrestee has started to shoot, but is justified where circumstances seem to require it for his own protection, in firing first.<sup>620</sup> For example, a marshal in good faith attempting to effect an arrest was justified in firing first when the offender was armed with a pistol and committed an overt act sufficient to create in the mind of a reasonable man, and which did create in the mind of the officer, the belief that the other was about to draw a weapon and fire.<sup>621</sup> In another interesting case certain citizens were called upon to act as members of a *posse comitatus* to assist in the arrest of a man indicted in a federal court for resisting its officers. He was a dangerous and desperate man and declared he would not be taken alive, as these citizens knew. They were ordered to go toward his house from the rear, while officers approached from the front. Seeing the officers approaching, the wanted man ran out at the rear with a pistol in his hand. He ran toward the posse, members of which twice ordered him to halt; but he kept on until quite close, when he turned toward a large tree. Believing he intended to shelter himself behind it and fire on them, these citizens fired on him and killed him. It was held that what they did was done in the lawful discharge of a duty imposed on them by the laws of the United States and they were justified.<sup>622</sup>

d. *To Prevent Escape*

An arrestor is privileged to use the same type and degree of force to prevent the escape of a prisoner who has once been arrested as in making the original arrest.<sup>623</sup> He is subject to the same limitations<sup>624</sup> unless the prisoner

to do so constitutes justifiable homicide under sec. 4366, Stats." *Krueger v. State*, 171 Wis. 566, 582, 177 N. W. 917, 923 (1920).

620. *West Virginia v. Laing*, 133 Fed. 887 (4th Cir. 1904). The use of firearms required a change in the matter of timing in the law of self-defense. One who has reasonable ground to believe that another is about to draw a firearm, and shoot him unlawfully, is privileged to draw first. *Inbau, Firearms and the Legal Doctrine*, 7 TUL. L. REV. 528, 538-39 (1933).

621. *Hammond v. State*, 147 Ala. 79, 41 So. 761 (1906).

622. *West Virginia v. Laing*, 133 Fed. 887 (4th Cir. 1904).

623. RESTATEMENT, TORTS § 134 (1934).

624. *Id.* at comment *d* (1934). "It is recognized as a general rule that in a case of a misdemeanor an officer has no right, except in self-defense, to kill the offender, either in attempting to make an arrest, or in preventing his escape after arrest." *Loveless v. Hardy*, 201 Ala. 605, 607, 79 So. 37, 39 (1918); and *see Smith v. State*, 59 Ark. 132, 139, 26 S. W. 712, 714 (1894); *Thomas v. Kinkadee*, 55 Ark. 502, 509, 18 S. W. 854, 856 (1892); *Mullis v. State*, 196 Ga. 569, 581, 27 S. E. 2d 91, 98 (1943); *Brown v. Weaver*, 76 Miss. 7, 15, 23 So. 388, 389 (1898).

has committed some more serious offense while in custody.<sup>625</sup>

### 3. Handcuffing Arrestee

An officer has no arbitrary right to shackle an arrestee merely because he has been taken into custody.<sup>626</sup> On the other hand, the officer is responsible for the safe-keeping of his prisoner and must not permit an escape or rescue if reasonably preventable. The officer, moreover, is entitled to take reasonable precautions for his own protection and for the protection of third persons. Hence handcuffing is privileged whenever this precaution is reasonably believed to be necessary to prevent the prisoner from escaping or being rescued, or to prevent him from causing personal injury.<sup>627</sup>

"The right to handcuff must depend on the circumstances of each particular case, considering the nature of the charge, and the conduct and temper of the person in custody."<sup>628</sup> A large degree of discretion must be given the officer in this regard,<sup>629</sup> and where he has acted without wantonness or malice but in the good faith belief that handcuffing was a necessary precaution, it is not to be held unlawful because of what may be learned afterward.<sup>630</sup>

If the officer knows that his prisoner is, or is not, desperate or "slippery" he may govern his action accordingly; and he may act upon information received.<sup>631</sup> In general he may be guided by the offense for which the arrest was made: if for felony, he is privileged to handcuff his prisoner unless circumstances indicate that this is an unnecessary precaution;<sup>632</sup> if for mis-

625. The Kentucky court seems to have taken the position that deadly force may always be used if it reasonably appears necessary to prevent the escape of one who is at the time in the lawful custody of an officer, regardless of the offense for which the arrest was made. *Mays v. Commonwealth*, 266 Ky. 691, 99 S. W. 2d 801 (1936); *Giles v. Commonwealth*, 266 Ky. 475, 99 S. W. 2d 455 (1936). It permits the use of deadly force if the officer must use such force to *maintain the custody* of a misdemeanor, although if the misdemeanor should actually break away from the officer's grip, the use of deadly force to stop him in flight would be forbidden. See *Stevens v. Commonwealth*, 124 Ky. 32, 41, 98 S. W. 284, 286-87 (1906). This is a distinction, however, not generally recognized. RESTATEMENT, TORTS § 134 (1934).

626. RESTATEMENT, TORTS § 132, comment *b* (1934).

627. *Ibid.* "The sheriff cannot stop, when the man is unknown to him, at the moment of arrest to inquire into his character, or his intentions as to escape, or his guilt or innocence of the offense charged against him. His duty is to take him, to safely keep him, and to bring his body before a magistrate. If he does this without wantonness or malice, it is not for a jury to find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused, and to punish the sheriff in damages for what honestly appeared to him at the time to be reasonable and right." *Firestone v. Rice*, 71 Mich. 377, 387, 38 N. W. 885, 889 (1888).

628. VOORHEES, *THE LAW OF ARREST* 171 (2d ed. 1915).

629. *Dehm v. Hinman*, 56 Conn. 320, 15 Atl. 741 (1887); *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885 (1888); *Cochran v. Toher*, 14 Minn. 385 (1869); *State v. Stalcup*, 24 N. C. 50 (1841); *Leigh v. Cole*, 6 Cox C. C. 329 (1853); *Wright v. Court*, 4 B. & C. 596, 107 Eng. Rep. 1182 (K. B. 1825).

630. *McCullough v. Greenfield*, 133 Mich. 463, 95 N. W. 532 (1903); *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885 (1888).

631. See *Firestone v. Rice*, 71 Mich. 377, 386, 38 N. W. 885, 888 (1888).

632. An officer may be justified in handcuffing one arrested for felony although there

demeanor, he should avoid the use of handcuffs in the absence of some special reason therefor.<sup>633</sup>

#### 4. Breaking Doors and Windows

It was settled at a very early day that an arrest on a charge of crime could be made in the house of the arrestee himself, because such an arrest was made in the king's name and no man can have a castle against the king.<sup>634</sup> It was also settled that the arrest might be in the house of another where the offender had taken refuge, or was reasonably believed to have done so.<sup>635</sup>

As to breaking open doors and windows, assuming this to be necessary to reach the place where the person to be arrested is, or is reasonably supposed to be,<sup>636</sup> and that authority and purpose have been announced and admission demanded without avail,<sup>637</sup> the rule of the common law is that if the building is *not* a dwelling place, the authority to arrest includes the authority to enter by force.<sup>638</sup> This has not been changed by statute. As to the

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has been no actual resistance or attempt to escape. 1 WHARTON, CRIMINAL PROCEDURE § 102 (10th ed., Kerr, 1918). The more serious the felony, the greater the need for precautions.

633. *Hamilton v. Massie*, 18 Ont. 585 (1889). A sheriff may be liable for the act of his deputy in putting irons and handcuffs upon a prisoner charged with criminal libel, in conducting him through a city's streets from a jail to a railway station. *Shields v. Pflanz*, 101 Ky. 407, 41 S. W. 267 (1897). An officer may be liable for needlessly handcuffing a misdemeanant to a convicted felon and leading them down the street. *Leigh v. Cole*, 6 Cox C. C. 329 (1853). In the absence of some good reason a prisoner must not be brought into court shackled. *Faire v. State*, 58 Ala. 74 (1877); *People v. Harrington*, 42 Cal. 165 (1871); *Lee v. State*, 51 Miss. 566 (1875); *State v. Kring*, 64 Mo. 591 (1877). Handcuffs may be used on a misdemeanant when there is good reason therefor. *Dehm v. Hinman*, 56 Conn. 320, 15 Atl. 741 (1887). This is true when the prisoner has shown an inclination to escape. *State v. Sigman*, 106 N. C. 728, 11 S. E. 520 (1890). An officer arrested two persons accused of a misdemeanor. It was long after dark, they were strangers to him and he had a long way to go. In the absence of anything in his conduct to indicate wantonness or malice it was held that his precaution of placing handcuffs on the prisoners was justified and it was error to leave it to the jury. *McCullough v. Greenfield*, 133 Mich. 463, 95 N. W. 532 (1903).

634. "... the liberty or privilege of a house doth not hold against the King." *Semayne's Case*, 5 Co. Rep. 91a, 92a, 77 Eng. Rep. 194, 197 (K. B. 1604). "The doctrine that a man's house is his castle, which cannot be invaded in the service of process, was always subject to the exception that the liberty or privilege of the house did not exist against the king." *State v. Mooring*, 115 N. C. 709, 711, 20 S. E. 182 (1894). Statements indicating a contrary result have reference to arrest in civil cases. See 3 BL. COMM. \*288. Such arrests are not authorized in Tennessee.

635. An English writer suggested that even an officer was a trespasser if he entered the house of a third person without permission and failed to find the one accused therein, unless he was acting under a warrant. 1 EAST P. C. \*324. It is doubtful if this is a correct statement of the English law, but in any case the rule in this country is that the officer is protected in entering the house of a third person to make an authorized arrest if he believes the arrestee is therein and has reasonable grounds for such belief. *Commonwealth v. Irwin*, 83 Mass. 587 (1861); *Commonwealth v. Reynolds*, 120 Mass. 190, 1 Am. Rep. 510 (1876); RESTATEMENT, TORTS § 129(b) (1934).

636. The authority is not limited to a dwelling house in which the arrestee is actually found, but extends to a house in which he is reasonably believed to be. *Smith v. Tate*, 143 Tenn. 268, 227 S. W. 1026 (1921).

637. § 11538.

638. RESTATEMENT, TORTS §§ 129, 204, 205, 213 (1934). The *Restatement* speaks also of breaking into the dwelling place, but that is not mentioned in the sentence in the text because it has been changed by the statute. At common law an officer, after notice and

dwelling house itself the provisions of the code are as follows (with the same assumption as above in regard to notice and demand): (1) an officer seeking to make an authorized arrest for any crime, with or without a warrant, may break open an outer or inner door or window of any dwelling house, either that of the arrestee or another;<sup>639</sup> (2) anyone, officer or private person, in fresh pursuit of one who has escaped from his lawful custody, may break open an outer or inner door of any dwelling house, either that of the arrestee or another;<sup>640</sup> (3) a private person (in a case other than recapture) seeking to make an authorized arrest of one who has committed a felony, may break open any outer or inner door or window of the dwelling house of the felon himself; but he may not break such doors or windows to arrest for a misdemeanor, nor may he break the doors or windows of the dwelling house of one other than the arrestee even to apprehend a felon.<sup>641</sup>

This distinction between the privilege of an officer and that of a private person is of great importance to the officer himself. As pointed out previously, an officer arresting without a warrant outside of his bailiwick is acting, not in his official capacity but merely as a private person (unless it is a case of recapture of one who has escaped from his custody).<sup>642</sup> An officer is authorized to arrest without a warrant, and outside his bailiwick, for any public offense committed in his presence because any private person has such

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demand without avail, in making an authorized arrest for any crime, either in obedience to a warrant or without a warrant, is authorized to break the doors or windows of any dwelling house in which the arrestee has taken refuge or is reasonably believed to have done so. 1 BISHOP, NEW CRIMINAL PROCEDURE §§ 196, 203 (2d ed., Underhill, 1913).

Statements may be found to the effect that an officer's authority to break doors and windows of a dwelling house, when arresting without a warrant, is limited to arrests for treason or felony, or for an affray or other breach of the peace committed in his presence. See *McLennon v. Richardson*, 81 Mass. 74 (1860); A. L. I. CODE OF CRIMINAL PROCEDURE 253-54 (Official Draft with Commentaries, 1931). But since his authority to arrest without a warrant was subject to the same limitation, this seems only another way of saying he was privileged to break such doors if necessary to make an arrest he was authorized to make. At common law a private person may break such doors or windows to make an arrest for a felony committed in his presence, but not to make an original arrest on reasonable suspicion of felony or for a misdemeanor. A. L. I. CODE OF CRIMINAL PROCEDURE 255 (Official Draft with Commentaries, 1931).

639. "To make an arrest, either with or without a warrant, the officer may break open any outer or inner door or window of a dwelling house, if, after notice of his office, authority, and purpose, he is refused admittance." § 11538. This authorizes officers, if necessary to make an authorized arrest and after proper notice and demand, to break into the house of a third person in which the arrestee is reasonably believed to be hiding. *Smith v. Tate*, 143 Tenn. 268, 227 S. W. 1026 (1921).

640. "To retake the party escaping or rescued, the person pursuing may, after notice of his intention and refusal of admittance, break open any outer or inner door or window of a dwelling house." § 11546. This authorizes breaking into the house of one other than the arrestee. *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906).

641. "If the person to be arrested has committed a felony, and a private person, after notice of his intention to make the arrest, is refused admittance, he may break open an outer or inner door or window of a dwelling house, to make the arrest." § 11543. This expressly limits the authority to the case in which the arrestee has committed a felony. The wording does not seem to limit the breaking to the dwelling house of the arrestee, but this limitation was established in *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906). This limitation was approved later. See *Smith v. Tate*, 143 Tenn. 268, 275, 227 S. W. 1026, 1028 (1921).

642. *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906).



authority.<sup>643</sup> And this is true whether the officer is outside his bailiwick when the offense is committed or follows the offender out on fresh pursuit. But if the officer is acting for the moment in the capacity of a private person he must not break the doors or windows of a dwelling house to arrest for a misdemeanor, nor must he break such doors or windows of a dwelling house not that of the arrestee himself even in arresting for felony. For example, in one case the sheriff of Benton County went into Gibson County to arrest a convicted felon. The sheriff had no warrant and the felon had not escaped from his custody. He broke into the house of a third person in which he believed the felon was hiding. It was held that this was unlawful because he was acting for the moment in the capacity of a private person and not that of an officer.<sup>644</sup>

It has been assumed up to this point that authority and purpose have been announced and admission demanded without avail. The statute speaks of the officer's authority to break doors and windows if he is refused admittance "after notice of his office, authority, and purpose."<sup>645</sup> This notice must be given unless it is obviously useless. An officer on the heels of a fleeing offender who has just rushed into his house and closed the door, should not give time for the door to be locked while he shouts a futile notice and demand.<sup>646</sup>

### *C. Search and Seizure*

Problems of the search warrant, and the proper execution of such a warrant, are beyond the scope of the present undertaking. We are considering the duties and privileges of an arrestor and as a part of this field must give attention to search and seizure insofar as these are incident to arrest. Involved are (1) constitution and statutes, (2) basis for search and seizure, (3) what constitutes search, (4) extent of search, (5) time of search, (6) what may be seized, and (7) protective custody.

#### *1. Constitution and Statutes*

The Constitution of Tennessee forbids "unreasonable searches and

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643. § 11541.

644. *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906).

645. § 11538. If it is a case of pursuit to recapture after escape he must give "notice of his intention." § 11546. A private person seeking to arrest a felon must give "notice of his intention to make the arrest." § 11543.

646. No case on this point has been found but the analogies are strong. The general notice of arrest (if a building is not involved) is not required if it is useless. *RESTATEMENT, TORTS* § 128(2)(c) (1934). The statute authorizing the breaking of doors and windows to execute a search warrant says: "... if, after notice of his authority and purpose, he is refused admittance." § 11904. But this does not require notice if there is no one in the building at the time. *Collins v. State*, 184 Tenn. 356, 199 S. W. 2d 96 (1947). And it is just as useless for an officer to give notice to one trying to lock him out as if no one was there.

seizures.”<sup>647</sup> Of this important safeguard of the right of privacy, the court has said: “At the very foundation of our State is the right of the people to be secure in their persons, houses, papers, and possessions. Infringement of such individual rights can not be tolerated until we tire of democracy and are ready for communism or a despotism.”<sup>648</sup> On the other hand, while the constitution places limitations upon the issuance of search warrants,<sup>649</sup> the basic ban is against unreasonable searches and seizures.<sup>650</sup> “A search without warrant may be reasonable, and a search with warrant may be unreasonable.”<sup>651</sup> The common law has long recognized the reasonableness of a proper search and seizure following a lawful arrest and as an incident thereto.<sup>652</sup>

As is true in many parts of the law of arrest, the statutes dealing with search and seizure are so incomplete as to give a very erroneous picture if considered apart from the common law. The statutes deal only with (1) search warrants and searches thereunder,<sup>653</sup> and (2) searches by oral order of a magistrate and in his presence.<sup>654</sup> They leave untouched the whole field of search and seizure incident to arrest, and the common law thereon is in full force.<sup>655</sup>

647. Art. I, § 7.

648. *Craven v. State*, 148 Tenn. 517, 519-20, 256 S. W. 431, 432 (1923); *Hughes v. State*, 176 Tenn. 330, 340, 141 S. W. 2d 477, 481 (1940); *Robertson v. State*, 184 Tenn. 277, 282, 198 S. W. 2d 633, 635 (1947).

649. “. . . general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed . . . are dangerous to liberty, and ought not to be granted.” Art. I, § 7.

650. “The constitution does not prohibit searches in general, but only those that are unreasonable.” *State v. Hall*, 164 Tenn. 548, 550, 51 S. W. 2d 851, 852 (1932).

651. *People v. Milone*, 119 Misc. 22, 23, 195 N. Y. Supp. 488, 489 (Co. Ct. 1922).

652. *United States v. Petti*, 168 F. 2d 221 (2d Cir. 1948); *People v. DeMarios*, 401 Ill. 146, 81 N. E. 2d 464 (1948); *Fitzgerald v. State*, 80 Okla. Cr. 43, 156 P. 2d 628 (1945); and see *Angello v. United States*, 269 U. S. 20, 30, 46 Sup. Ct. 4, 70 L. Ed. 145 (1925).

“Assuming always the predicate of a precedent lawful arrest, the common law is universally recognized to authorize a search by the arresting officer of the person and effects of the prisoner. . . .” *Elliott v. State*, 173 Tenn. 203, 208, 116 S. W. 2d 1009, 1011 (1938); and see *Trial of Henry and John Sheares*, 27 How. St. Tr. 255, 321 (1798). “Search and seizure incident to lawful arrest is a practice of ancient origin. . . .” *Harris v. United States*, 331 U. S. 145, 150, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947), 1 VAND. L. REV. 60. Where there is obviously no reason to expect a search will disclose anything properly to be seized, there should be no search. *Leigh v. Cole*, 6 Cox C. C. 329 (1853).

653. §§ 11897-11913.

654. § 11914.

655. *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588, 20 A. L. R. 639 (1922); see *Elliott v. State*, 173 Tenn. 203, 209-10, 116 S. W. 2d 1009, 1012 (1938). “We find no statute of this State giving the arresting officer authority to search a prisoner, but no statute is necessary. The power exists from the nature and objects of the public duty the officer is required to perform. Such authority is directly given to a committing magistrate by statute . . . , but unless the arresting officer has the authority immediately, on making the arrest, all evidence of crime and of identification of the criminal might be destroyed before the prisoner could be taken before the magistrate.” *Holker v. Hennessey*, 141 Mo. 527, 540, 42 S. W. 1090, 1093 (1897); and see *Commercial Exchange Bank v. McLeod*, 65 Iowa 665, 667, 22 N. W. 919 (1885).

## 2. Basis for Search and Seizure

The basis for search and seizure incident to arrest is a lawful arrest.<sup>656</sup> "The arrest must be legal or the search is illegal."<sup>657</sup> Such a search cannot be upheld if it is found that the real purpose was to search and that the arrest was a mere pretext.<sup>658</sup> It has been held, moreover, that if State Highway Patrolmen who are empowered under the law to stop a car at any time and require an exhibition of the driver's license, make such a requirement not in the proper exercise of their special privilege but only as a pretext to see what is in the car, such stopping constitutes an unlawful arrest which invalidates any resulting search or seizure.<sup>659</sup>

*Warrant.* Although a discussion of the search warrant and its execution is not to be included, three brief references to the subject of warrant are required. First, although the officer's possession of a warrant of arrest may have an important bearing upon the lawfulness of the apprehension, a search of the arrestee will be *without a warrant* unless he had also a search warrant.<sup>660</sup> Second, a search warrant demanding a search of property *only*, such as a building or a truck, does not authorize a search of the owner's person.<sup>661</sup>

656. *Jones v. State*, 161 Tenn. 370, 33 S. W. 2d 59 (1930); *Goodwin v. State*, 148 Tenn. 682, 257 S. W. 79 (1924); *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588 (1922).

"When the arrest is lawful the right to search the person follows." *Goodwin v. State*, 148 Tenn. 682, 257 S. W. 79, 80 (1924). "Of course, it is well settled that where an arrest is lawfully made, the search is lawful." *McCanless v. Evans*, 177 Tenn. 86, 92, 146 S. W. 2d 354, 356 (1941). "Having been justifiably arrested, the search was warranted. . . ." *Dittberner v. State*, 155 Tenn. 102, 105, 291 S. W. 839, 840 (1927).

657. *People v. Henneman*, 367 Ill. 151, 153, 10 N. E. 2d 649, 650 (1937); *accord*, *Powell v. Commonwealth*, 307 Ky. 545, 211 S. W. 2d 850 (1948). "Search of an unlawfully arrested person is unreasonable; . . ." Waite, *The Law of Arrest*, 24 TEX. L. REV. 279, 285 (1946).

658. *United States v. Lefkowitz*, 285 U. S. 452, 467, 52 Sup. Ct. 420, 76 L. Ed. 877 (1932); *Worthington v. United States*, 166 F. 2d 557 (6th Cir. 1948); *Henderson v. United States*, 12 F. 2d 528, 531 (4th Cir. 1926). The arrest must be in good faith and not a mere subterfuge. *See Odell v. State ex rel. Field*, 193 Okla. 680, 681, 147 P. 2d 154, 156 (1944); *Tacker v. State*, 72 Okla. Cr. 72, 113 P. 2d 394 (1941).

The fact that a duly licensed duck hunter, who was legally in the area, refused to permit game warden to search his person to examine shot gun shells, the outline of which warden could see in hunter's pocket, did not give warden cause to suspect hunter of possessing illegal shells so as to justify arrest of hunter and consequently a search of his person. *State v. Gibbs*, 252 Wis. 227, 31 N. W. 2d 143 (1948).

659. *Robertson v. State*, 184 Tenn. 277, 198 S. W. 2d 633 (1947); *Smith v. State*, 182 Tenn. 158, 184 S. W. 2d 390 (1945); *Cox v. State*, 181 Tenn. 344, 181 S. W. 2d 338 (1944); *cf. Dolen v. State*, 216 S. W. 2d 351 (Tenn. 1948). An officer who stopped to issue a warning to a motorist parked on the highway at night with no tail light, found him intoxicated with a whiskey bottle protruding from his shirt. The officer's arrest of the motorist, and search of the car incident to the arrest, was held to be authorized. *Worley v. State*, 77 Okla. Cr. 154, 140 P. 2d 246 (1943).

660. In explaining a case in which the search and seizure were authorized as incident to a lawful apprehension under an arrest warrant, the court said: "This was not a search warrant and no searches were made under it." *Banks v. Farwell*, 21 Pick. 156, 159 (Mass. 1839).

661. *Parker v. State*, 177 Tenn. 380, 150 S. W. 2d 725 (1941). Where, on the other hand, in connection with a search of the premises described in the warrant, an automobile parked near the building and on the premises described, is searched and liquor seized, it is not an unreasonable search and seizure. *Lawson v. State*, 176 Tenn. 457, 143 S. W. 2d 716 (1940).

The third concerns the availability of a search warrant. The Supreme Court of the United States, confusing its power to make rules of procedure for the future<sup>662</sup> with its power to decide cases on the basis of what has already happened, held that the officer's privilege of search and seizure incident to arrest is conditional upon the unavailability of a search warrant.<sup>663</sup> Under this holding, if there is adequate opportunity in advance to secure warrants (which otherwise would not be needed), but neither an arrest warrant nor a search warrant is obtained, the arrest is quite legal but the resulting search and seizure are unlawful. The rule thus established concerns arrests by federal officers only, and as it finds no support in the common law,<sup>664</sup> and very little from the standpoint of policy,<sup>665</sup> it is not likely to be followed very generally by the states. The Tennessee court has taken the opposite view.<sup>666</sup>

*Consent.* A search may be lawful without either a search warrant or an arrest, if consent is duly given,<sup>667</sup> but the mere failure to resist an unlawful

662. 18 U. S. C. § 3771 (1948).

663. *Trupiano v. United States*, 334 U. S. 699, 68 Sup. Ct. 1229, 92 L. Ed. 1663 (1948), 2 VAND. L. REV. 116.

664. "Today, the Court for the first time has branded such a search illegal. . . . And this despite the long line of decisions in this Court recognizing as consistent with the restrictions of the Fourth Amendment the power of law-enforcement officers to make reasonable searches and seizures as incidents to lawful arrests." Mr. Chief Justice Vinson, dissenting, 334 U. S. at 711, 713.

665. "The validity of a search and seizure as incident to a lawful arrest has been based upon a recognition by this Court that where law-enforcement agents have lawfully gained entrance into premises and have executed a valid arrest of the occupant, the vital rights of privacy protected by the Fourth Amendment are not denied by seizure of contraband materials and instrumentalities of crime in open view or such as may be brought to light by a reasonable search." *Id.* at 714.

At common law the privilege to arrest without a warrant is not defeated by the mere fact that there is opportunity to obtain a warrant. RESTATEMENT, TORTS § 119, comment b (1934). The right of liberty is more important than the right of privacy. Hence if availability of a warrant does not defeat the privilege to arrest without a warrant, *a fortiori* it should not defeat the privilege to search without a warrant.

The normal procedure to have brought about a change in age-old practice would have been for the Court to have regulated this matter by amendment to the Federal Rules of Criminal Procedure. Had this method been adopted the Court probably would have submitted the matter to a committee for study and report, although it would not have been bound by recommendations submitted. Any committee study of the problem would have centered around four possibilities. These are: that when there is adequate opportunity in advance to secure warrants which otherwise would not be needed,—(1) no warrant shall be required either for the arrest or for search and seizure incident thereto; (2) there should be no arrest without an arrest warrant and no search without a search warrant; (3) there should be no arrest without an arrest warrant, but following an arrest under such a warrant the normal rules of search and seizure incident to arrest should apply; (4) no warrant should be needed for the arrest but there should be no search without a search warrant. A careful consideration of these four possibilities probably would have resulted in the conclusion that the one mentioned last is the least desirable.

666. *Cope v. State*, 157 Tenn. 199, 7 S. W. 2d 805 (1928). In this case there was time to secure a search warrant as evidenced by the fact that the officers went before a justice of the peace and obtained a paper purporting to be a search warrant. It was invalid and was not even introduced in evidence, but the search was upheld. The arrest was not mentioned in this case, but a search of the dwelling without a warrant or consent, and not incident to an arrest of defendant, would have been clearly unlawful. *Lucarini v. State*, 159 Tenn. 373, 19 S. W. 2d 239 (1929). "One's private residence may not be searched upon 'probable cause.'" *Simpson v. State*, 215 S. W. 2d 617, 618 (Tex. Cr. 1948).

667. *Frix v. State*, 148 Tenn. 478, 256 S. W. 449 (1923); *Calhoun v. United States*,

search is not consent.<sup>668</sup> This, however, is beyond the periphery of this discussion as is also the possibility of lawful search without a warrant in the absence of either arrest or consent.<sup>669</sup>

### 3. What Constitutes Search

A search implies prying into hidden places;<sup>670</sup> it is not a search to observe what is open to view.<sup>671</sup> An officer who is lawfully where he has a right to be is not required to close his eyes to avoid seeing the evidence of crime.<sup>672</sup> On the other hand, if the officer must violate the law or commit trespass to reach the point from which the observation is made, this constitutes a search.<sup>673</sup>

The mere fact of stopping a person and asking him what he has in a package or car does not constitute a search.<sup>674</sup> And the statute which makes it a misdemeanor for one hunting or fishing to refuse to permit a game warden

172 F. 2d 457 (5th Cir. 1949); *Ruhl v. United States*, 148 F. 2d 173 (10th Cir. 1945); *Application of Fried*, 68 F. Supp. 961 (S. D. N. Y. 1946).

668. *Hampton v. State*, 148 Tenn. 155, 252 S. W. 1007 (1923); *United States v. Asendio*, 171 F. 2d 122 (3d Cir. 1948); *Pritchett v. State*, 78 Okla. Cr. 67, 143 P. 2d 622 (1943); cf. *United States v. Di Re*, 332 U. S. 581, 68 Sup. Ct. 222, 92 L. Ed. 210 (1948).

669. Without either a search warrant, or an arrest, or consent, there can be no lawful search of the person, *Gholson v. Commonwealth*, 212 S. W. 2d 537 (Ky. 1948), or of the dwelling house, *Lucarini v. State*, 159 Tenn. 373, 19 S. W. 2d 239 (1929). On the other hand there is authority in support of the view that there may be sufficient ground for believing a car is being used to commit an offense to authorize a search of the car without any of the elements mentioned above. The Supreme Court held that this was true under the former National Prohibition Act. *Carroll v. United States*, 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925). In one case it was suggested that there is no such power in Tennessee. See *Tenpenny v. State*, 151 Tenn. 669, 674, 270 S. W. 989, 990 (1925). In this case, however, there was an arrest and the holding was that the court erroneously excluded evidence by the defense which was offered to show "whether or not the arrest and seizure by the sheriff was justified under the law." 151 Tenn. at 680, 270 S. W. at 922. A search of a car without a search warrant, arrest or consent was upheld on the ground that there was sufficient ground for a reasonable belief that it was being used for an unlawful purpose. *Smith v. State*, 155 Tenn. 40, 290 S. W. 4 (1927). Clearly an ungrounded suspicion will not authorize the search of a car when there has been no arrest. *Harlow v. State*, 159 Tenn. 537, 20 S. W. 2d 1045 (1929).

The common categories of lawful search and seizure, apart from consent, are (1) pursuant to a warrant and (2) incident to arrest. These two do not exhaust all possible types of lawful search and seizure. Traditionally, at common law, a search for stolen property was permissible. See *United States v. Smith*, 68 F. Supp. 737, 738 (D. D. C. 1946).

670. *Crowell v. State*, 147 Tex. Cr. 299, 180 S. W. 2d 343 (1944).

671. *Murphy v. District of Columbia*, 31 A. 2d 894 (D. C. Mun. Ct. App. 1943). "... it further appears that they never at any time made what might properly be called a 'search.' All the whiskey they found there and took possession of was in view without any 'search.'" *McCanless v. Evans*, 177 Tenn. 86, 91, 146 S. W. 2d 354, 356 (1941).

672. *Love v. United States*, 170 F. 2d 32 (4th Cir. 1948); *State v. Pelosi*, 199 P. 2d 125 (Ariz. 1948); *State v. Hoffman*, 245 Wis. 367, 14 N. W. 2d 146 (1944).

673. *Robertson v. State*, 184 Tenn. 277, 198 S. W. 2d 633 (1947); *Smith v. State*, 182 Tenn. 158, 184 S. W. 2d 390 (1945); *Cox v. State*, 181 Tenn. 344, 181 S. W. 2d 338 (1944); *Lucarini v. State*, 159 Tenn. 373, 19 S. W. 2d 239 (1929); *McDonald v. United States*, 69 Sup. Ct. 191 (U. S. 1948). An officer, without a search warrant, who entered a fenced lot by letting down some bars, and found a still there, was a trespasser and guilty of an unlawful search. *Welch v. State*, 154 Tenn. 60, 289 S. W. 510 (1926). Cf. *Hester v. United States*, 265 U. S. 57, 44 Sup. Ct. 445, 68 L. Ed. 898 (1924), in which it was held that a trespass on "open fields" did not render inadmissible what the officers found there.

674. *Pena v. State*, 111 Tex. Cr. 218, 12 S. W. 2d 1015 (1928).

to inspect his catch or kill in order to see that he has not exceeded the statutory limit does not violate the search and seizure provision of the constitution, but is valid.<sup>675</sup>

#### 4. Extent of Search

The privilege to search incident to arrest is not an arbitrary formula. It is grounded upon the premise that the apprehending officer has reason to believe that it is a proper precaution in the particular case; and where there is obviously no reason to expect anything properly to be seized will be found, there should be no search.<sup>676</sup> If, for example, an officer should arrest a prominent and respectable member of the community on a technical charge of violating a traffic ordinance, and should subject him to a very thorough search, not to find anything but just to humiliate him, this would be clearly unlawful. On the other hand, officers have been shot and killed by gangsters arrested on traffic charges and hence there is no rule which makes the cause of the arrest the sole determinant of the authority to search. If the nature of the offense for which the arrest was made, the known character of the arrestee, information received regarding him, his appearance or attitude, or anything else, gives the officer ground to believe that a search is a reasonable precaution, a lawful arrest may be followed by such search. And the nature and extent of the search will depend upon all the circumstances of the particular case.<sup>677</sup>

A very large discretion must be extended to the officer in this regard. There is a strong social interest in enabling him to safeguard himself and others, to prevent the escape of his prisoner, and to preserve the evidence of the crime. And the privilege to search one lawfully arrested must not be restricted in a manner calculated to defeat this interest. The officer must decide on the spur of the moment whether or not a search is necessary, and if so how thorough it must be, and will be protected as long as his action is grounded upon good faith and does not extend beyond established limits. Within these limits his privilege is not exceeded unless it is clearly shown that the search was not to promote law enforcement, but was prompted by some ulterior motive.

##### a. *The Person*

Unless the circumstances are such that any search is obviously uncalled for, an apprehending officer has unquestioned authority to search the person

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675. *State v. Hall*, 164 Tenn. 548, 51 S. W. 2d 851 (1932).

676. *Leigh v. Cole*, 6 Cox C. C. 329 (1853).

677. *Harris v. United States*, 331 U. S. 145, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947); see *Woolfolk v. State*, 81 Ga. 551, 562, 8 S. E. 724, 728 (1889). "Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Company v. United States*, 282 U. S. 344, 357, 51 Sup. Ct. 153, 75 L. Ed. 374 (1931). "The same meticulous investigation which would be appropriate in a search for two small canceled checks could not be considered reasonable where agents are seeking a stolen automobile or an illegal still." *Harris v. United States*, *supra*, at 152.

of the arrestee.<sup>678</sup> This may be a close and careful search,<sup>679</sup> and "if, in the prosecution of this search, it becomes necessary to remove the clothing of such person, the officer has a right to do so."<sup>680</sup> Incriminating clothing worn by the arrestee,—such as bloody shoes, socks and trousers worn by one accused of murder by kicking the deceased to death—may be seized and held as evidence.<sup>681</sup>

Obviously unreasonable steps must be avoided.<sup>682</sup> It has been pointed out, for example, that a male officer would exceed his privilege if he should require a woman to strip and stand naked before him.<sup>683</sup> Such procedure should be left to the police matron; or if no police matron is available at the moment, to some matron called upon by the officer to assist him for this special purpose.

As pointed out previously, a "frisk" should be recognized as entirely lawful, even without arrest, whenever this is a reasonable safety precaution.<sup>684</sup>

An officer making an arrest has no privilege, without some authority other than the arrest, to take property of a third person from the premises of such person, on the mere claim that such property is evidence against the arrestee.<sup>685</sup> The arrestee himself, however, is in no position to complain since the right violated is that of the owner of the property.<sup>686</sup> The arrest of one person carries with it no privilege to search his companion.<sup>687</sup>

b. *Purse or Luggage*

A search incident to lawful arrest is not limited to the person of the arrestee but may extend to his purse<sup>688</sup> or luggage.<sup>689</sup> This clearly applies to a grip or a suitcase which the prisoner is carrying at the time of the arrest,<sup>690</sup> but it is not limited to this situation. The fact that the prisoner had set the

678. *Elliott v. State*, 173 Tenn. 203, 116 S. W. 2d 1009 (1938); *Goodwin v. State*, 148 Tenn. 682, 257 S. W. 79 (1924); *Agnello v. United States*, 269 U. S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145 (1925); *United States v. Ford Automobile*, 2 F. 2d 886 (W. D. Tenn. 1924); *People v. DuShane*, 240 Mich. 35, 214 N. W. 944 (1927); *Steyh v. State*, 58 Okla. Cr. 258, 52 P. 2d 121 (1935).

679. *Reifsnnyder v. Lee*, 44 Iowa 101 (1876). Needless to say, the search may extend to the pockets of the clothing being worn by the arrestee. *People v. Chiagles*, 237 N. Y. 193, 142 N. E. 583 (1923). It may also include clothing not worn at the moment but deposited nearby. *People v. Manko*, 189 N. Y. Supp. 357 (Sup. Ct. 1921).

680. *Woolfolk v. State*, 81 Ga. 551, 562, 8 S. E. 724, 728 (1889).

681. *Northern v. State*, 216 S. W. 2d 192 (Tex. Cr. 1948).

682. RESTATEMENT, TORTS § 132, comment b (1934).

683. See *Hebrew v. Pulis*, 73 N. J. L. 621, 64 Atl. 121 (1906).

684. *Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43 (1908).

685. *Owens v. Way*, 141 Ga. 796, 82 S. E. 132 (1914); cf. *Newberry v. Carpenter*, 107 Mich. 567, 65 N. W. 530 (1895).

686. *State v. Laundry*, 103 Ore. 443, 204 Pac. 958 (1922).

687. *United States v. Di Re*, 332 U. S. 581, 68 Sup. Ct. 222, 92 L. Ed. 210 (1948).

688. *Matthews v. Correa*, 135 F. 2d 534 (2d Cir. 1943). "It is a general rule that whenever officers have authority to conduct a search, their search can extend to portable effects, such as the contents of baggage, box, or bundle." *Wright v. State*, 177 Md. 230, 233, 9 A. 2d 253, 255 (1939).

689. *United States v. Stein*, 53 F. Supp. 911 (W. D. N. Y. 1943).

690. *State v. Pelosi*, 199 P. 2d 125 (Ariz. 1948); see *State v. Hughlett*, 124 Wash. 366, 370, 214 Pac. 841, 843 (1923).

suitcase down for a moment while he rested, or had placed it under his seat or in an overhead rack on the train, would clearly be no bar to a search.<sup>691</sup> An extreme case of search of luggage without a warrant was this: As a result of a search of the person of one lawfully arrested, the officers found a trunk check. They took the check to the one having possession of the trunk and redeemed and searched the trunk—the contents of which proved to be intimately connected with the crime. This was held to be within their privilege under the circumstances.<sup>692</sup>

### c. *Automobiles*

The search of one lawfully arrested may extend to the automobile he is driving at the time of the apprehension,<sup>693</sup> and if circumstances indicate any need therefor<sup>694</sup> may include an exploration under seats,<sup>695</sup> inside pockets,<sup>696</sup> and in the luggage compartment.<sup>697</sup> One about to be arrested cannot prevent the search of his car by fleeing from it.<sup>698</sup> In fact, it is not necessary for the arrestee to have been in the car when the attempt to apprehend him began. If he was in such a position as to be in actual control of the vehicle at the moment, it may be searched as an incident of the arrest.<sup>699</sup> The privilege to search the car includes the privilege to unlock where this is necessary.<sup>700</sup>

### d. *Buildings*

When a person is arrested on his own property the privilege to search

691. A lawful arrest of men hiding on the roof of a building authorized a search of a suitcase 10 or 12 feet away at the time. *Trousdale v. State*, 168 Tenn. 210, 76 S. W. 2d 646 (1934).

692. *United States v. Wilson*, 163 Fed. 338 (C. C. S. D. N. Y. 1908).

693. *Fuqua v. State*, 175 Tenn. 11, 130 S. W. 2d 125 (1939); *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588 (1922); *United States v. Ford Automobile*, 2 F. 2d 886 (W. D. Tenn. 1924); *People v. Exum*, 382 Ill. 204, 47 N. E. 2d 56 (1943); *Rucker v. State*, 77 N. E. 2d 355 (Ind. 1948); *People v. Rogers*, 303 Mich. 94, 5 N. W. 2d 668 (1942); *State v. Hughlett*, 124 Wash. 366, 214 Pac. 841 (1923).

694. An arrest for reckless driving confers no authority to search the luggage compartment of the car. *Elliott v. State*, 173 Tenn. 203, 116 S. W. 2d 1009 (1938). But an arrest for driving while drunk authorizes a search of the car for intoxicating liquor. *Fuqua v. State*, 175 Tenn. 11, 130 S. W. 2d 125 (1939).

695. *People v. DeMarios*, 401 Ill. 146, 81 N. E. 2d 464 (1948). Defendant claimed that the search was entirely unauthorized, but did not suggest that an authorized search must stop short of looking under the seat. The actual holding was that he was not in a position to object to the introduction in evidence of a revolver found under the seat, since he disclaimed ownership, control and even any knowledge of it.

696. *Callahan v. State*, 42 Okla. Cr. 425, 276 Pac. 494 (1929).

697. *Thomas v. State*, 196 Ind. 234, 146 N. E. 850 (1925).

698. *Stone v. State*, 161 Tenn. 290, 30 S. W. 2d 247 (1930); *People v. Barg*, 384 Ill. 172, 51 N. E. 2d 168 (1943).

699. *Patrick v. Commonwealth*, 199 Ky. 83, 250 S. W. 507 (1923). In one case a car several blocks away was opened with a key seized as a result of a search of arrestee, whereupon the car was searched. This search was held to be within the privilege. *People v. Garrett*, 232 Mich. 366, 205 N. W. 95 (1925). This is open to question. The search of arrestee's "house trailer" while he was in jail was held to be unauthorized. *Yarbrough v. State*, 136 Tex. Cr. 7, 123 S. W. 2d 356 (1939). This is distinguishable on the ground that it is a dwelling, but in another case in which the arrestee handed the keys of his car to an apprehending officer for the purpose of having the car driven to a place of safety, the search of the car was held unlawful. *State v. Jones*, 214 S. W. 2d 705 (Mo. 1948); cf. *People v. Tabet*, 83 N. E. 2d 329 (Ill. 1948).

700. *People v. Garrett*, 232 Mich. 366, 205 N. W. 95 (1925).



extends a reasonable distance from the place of the arrest<sup>701</sup> and includes the privilege to enter and explore barns,<sup>702</sup> sheds,<sup>703</sup> garages,<sup>704</sup> offices<sup>705</sup> and other buildings<sup>706</sup> which are not dwellings. There is no arbitrary limit as to the extent of such search on the premises on which the owner is arrested,<sup>707</sup> but it does not include different premises although they also belong to the arrestee and are not far away.<sup>708</sup>

*Dwellings.* There is no corresponding privilege to enter the arrestee's dwelling for the purpose of search merely because the arrest was elsewhere on his premises.<sup>709</sup> As previously explained, one with authority to make an arrest needs no warrant to enter a dwelling in which the person sought is reasonably believed to be.<sup>710</sup> The mere fact that an arrest is made in the dwelling house of arrestee is not sufficient to authorize a general exploratory search of the building for things having no connection with the offense for which the arrest was made.<sup>711</sup> It does, however, authorize a search there for things directly connected with this crime,<sup>712</sup> although there is some dis-

701. It has been held that open fields do not come within the protection of the Fourth Amendment and hence may be searched by federal officers without either search warrant or arrest of the owner. *Hester v. United States*, 265 U. S. 57, 44 Sup. Ct. 445, 68 L. Ed. 898 (1924). But the Tennessee Court has held that the state constitution includes fenced-in property used in connection with the dwelling although definitely beyond the "curtilage." *Welch v. State*, 154 Tenn. 60, 289 S. W. 510 (1926). It added *obiter* that it "would not include wild or waste lands, or other lands that were unoccupied." 154 Tenn. at 63, 289 S. W. at 511. If, however, the owner is arrested on his land a search of any part of that particular tract of land would no doubt be authorized if the circumstances indicated a need for such a search.

Oklahoma holds that it is not necessary to have a search warrant to search a public resort. Although the proprietor seems to have admitted only patrons having passes, the court said: "It was a place of public resort, and the officers, the same as any other citizen, had the right to enter it, and, if after entering, they saw the commission of a misdemeanor in their presence, as they did in the instant case, they had the right . . . to arrest the offender and search his person and his immediate surroundings." *Greer v. State*, 201 P. 2d 274, 276 (Okla. Cr. 1948).

702. *Kelley v. United States*, 61 F. 2d 843 (8th Cir. 1932).

703. *State v. Rotolo*, 39 Wyo. 181, 270 Pac. 665 (1928).

704. *State v. Estes*, 151 Wash. 51, 274 Pac. 1053 (1929).

705. *United States v. Davis*, 151 F. 2d 140 (2d Cir. 1945).

706. *Fitzgerald v. State*, 80 Okla. Cr. 43, 156 P. 2d 628 (1945). An arrest in the room in which the arrestee resided authorized search of a storeroom in his possession and control but separate from the room in which the arrest was made.

707. *Shew v. United States*, 155 F. 2d 628 (4th Cir. 1946) (20 feet); *Kelley v. United States*, 61 F. 2d 843 (8th Cir. 1932) (100 feet).

708. *Application of Rose*, 32 F. Supp. 103 (W. D. N. Y. 1940).

709. *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914); *Papani v. United States*, 84 F. 2d 160 (9th Cir. 1936); *Poulos v. United States*, 8 F. 2d 120 (6th Cir. 1925); *Thomas v. State*, 27 Okla. Cr. 264, 226 Pac. 600 (1924); *Fowler v. State*, 14 Tex. Cr. 69, 22 S. W. 2d 935 (1930). Where defendant was arrested in a field about a quarter of a mile from his house a search of the house without consent or a search warrant was illegal and required granting of a motion to suppress the evidence seized upon such search. *United States v. Coffman*, 50 F. Supp. 823 (S. D. Cal. 1943).

710. *Massa v. State*, 159 Tenn. 428, 19 S. W. 2d 248 (1929); *Smith v. Tate*, 143 Tenn. 268, 277 S. W. 1026 (1921); *Hughes v. State*, 196 Miss. 282, 17 So. 2d 444 (1944); *Monette v. Toney*, 119 Miss. 846, 81 So. 593 (1919).

711. *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 51 Sup. Ct. 153, 75 L. Ed. 374 (1931); *United States v. Antonelli Fireworks Co.*, 53 F. Supp. 870 (W. D. N. Y. 1943).

712. *State v. Carenza*, 357 Mo. 1172, 212 S. W. 2d 743 (1948).

agreement as to how extensive the search may be. Some courts seem to limit such a search to the room in which the apprehension occurred.<sup>713</sup> In rejecting such a limitation the Supreme Court of the United States said: "... the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment."<sup>714</sup> It has been held that an arrest in any other type of building may be sufficient to authorize a search in any part thereof, under the occupancy and control of the arrestee,<sup>715</sup> and the better view applies this same rule to the dwelling itself.<sup>716</sup> This means that the search may extend from roof to cellar if there is no severance of occupancy.

It has been very generally recognized that a search of arrestee's dwelling is not authorized by his arrest on the outside, even if close thereto,<sup>717</sup> but the Oklahoma court has held that the owner cannot prevent such a search by rushing out and concealing himself in the nearby shrubbery when he learns officers are coming to arrest him.<sup>718</sup> The search of the dwelling of one in jail is clearly unlawful if without either warrant or consent,<sup>719</sup> and the mere fact

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713. *People v. Conway*, 225 Mich. 152, 195 N. W. 679 (1923); *State v. Adams*, 103 W. Va. 77, 136 S. E. 703 (1927).

714. *Harris v. United States*, 331 U. S. 145, 152, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947), 1 VAND. L. REV. 60.

715. An arrest of the owner of a drugstore in the front part authorizes a search of the back room. *United States v. Seltzer*, 5 F. 2d 364 (D. Mass. 1925). An arrest of the owner of a soft drink parlor on the main floor authorizes a search of the basement. *Dibello v. United States*, 19 F. 2d 749 (8th Cir. 1927). The arrest of a physician in his office authorizes a search of his filing cabinet. *United States v. Lindenfeld*, 142 F. 2d 829 (2d Cir. 1944).

716. *Harris v. United States*, 331 U. S. 145, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947); *Matthews v. Correa*, 135 F. 2d 534 (2d Cir. 1943); *Pickett v. Marcucci's Liquors*, 112 Conn. 169, 151 Atl. 526 (1930); *State v. Carenza*, 357 Mo. 1172, 212 S. W. 2d 743 (1948). In an extreme case the arrest of the proprietor of a hotel in the lobby was held to authorize a search of his living quarters in another part of the building. *United States v. Charles*, 8 F. 2d 302 (N. D. Cal. 1925). This might well have been regarded an arrest outside of his dwelling.

717. An arrest in the owner's yard is insufficient to authorize a search of his dwelling. *Wallace v. State*, 42 Okla. Cr. 143, 275 Pac. 354 (1929); *Fowler v. State*, 114 Tex. Cr. 69, 22 S. W. 2d 935 (1930). Arrest in front of his house is insufficient. *Poulos v. United States*, 8 F. 2d 120 (6th Cir. 1925); *Thomas v. State*, 27 Okla. Cr. 264, 226 Pac. 600 (1924). Arrest in his car as he is leaving the house is insufficient. *Papani v. United States*, 84 F. 2d 160 (9th Cir. 1936). The Washington court seems to have taken a contrary view. *State v. McCollum*, 17 Wash. 2d 85, 136 P. 2d 165, 141 P. 2d 613 (1943); and see *State v. Much*, 156 Wash. 403, 287 Pac. 57 (1930); *State v. Evans*, 145 Wash. 4, 13, 258 Pac. 845, 849 (1927); cf. *City of Tacoma v. Houston*, 27 Wash. 2d 215, 177 P. 2d 886 (1947).

718. *Patton v. State*, 43 Okla. Cr. 436, 279 Pac. 694 (1929). If one arrested on the outside thereafter goes into the house the officers are privileged to go in with him to keep him in custody. And if evidence of another crime is seen by them because it is open to view there has been no unlawful search. *Soderberg v. State*, 31 Okla. Cr. 88, 237 Pac. 467 (1925).

719. *People v. Grod*, 385 Ill. 584, 53 N. E. 2d 591 (1944); *Davis v. State*, 113 Tex. Cr. 421, 21 S. W. 2d 509 (1929). The Washington court has upheld even such a search,—with a vigorous dissent. *State v. McCollum*, 17 Wash. 2d 85, 136 P. 2d 165, 141 P. 2d 613 (1943).

that a house key is found on arrestee gives no authority to search his dwelling.<sup>720</sup>

*Special problems.* It has been held that the lawful arrest of trespassers in a building, who were believed by the officers to be the occupants who were committing a crime there, was sufficient to authorize a search of the building;<sup>721</sup> and that the attempt to arrest one in a building was sufficient for this purpose although the attempt was unsuccessful.<sup>722</sup> It has been held also that officers, lawfully entering the house of a third person in search of an arrestee believed to be therein, may seize evidence of a crime being committed there by the householder, if it is open to view.<sup>723</sup>

### 5. Time of Search

In the absence of some other authority, such as consent, the search must be incidental to the arrest and not an exploration in the hope of finding a basis therefor.<sup>724</sup> On the other hand, if the purpose is to arrest and there is proper authority therefor, it is immaterial that the search and seizure may have preceded the arrest when they were practically simultaneous.<sup>725</sup>

The search of the person of the prisoner may take place at any time during custody if there seems reasonable ground for taking such precaution, and the search of his automobile may be postponed to a convenient time if the officers have taken and kept possession of it since the arrest was made;<sup>726</sup> but a search of the *place* of arrest must be instituted at the time of the arrest, or at least while the officers are still in control thereof.<sup>727</sup> If the search is properly started it may be continued for such time as is reasonably necessary, considering the condition of the premises and the object of the search.<sup>728</sup> Searches have been held not unreasonable under the particular circumstances although they lasted for five hours,<sup>729</sup> or twelve hours.<sup>730</sup>

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720. See *Ledbetter v. State*, 185 Tenn. 619, 207 S. W. 2d 336 (1948).

721. *United States v. Hotchkiss*, 60 F. Supp. 405 (D. Md. 1945).

722. *United States v. Elliott Hall Farm*, 42 F. Supp. 235 (D. N. J. 1941).

723. *Love v. United States*, 170 F. 2d 32 (4th Cir. 1948).

724. *United States v. Setaro*, 37 F. 2d 134 (D. Conn. 1930). The success of such an unauthorized search does not make it lawful. *People v. Henneman*, 367 Ill. 151, 10 N. E. 2d 649 (1937); *Parker v. State*, 177 Tenn. 380, 150 S. W. 2d 725 (1941).

725. *State v. Duffy*, 135 Ore. 290, 295 Pac. 953 (1931); *State v. Daniel*, 115 Ore. 187, 237 Pac. 373 (1925).

726. *Allgaier v. State*, 200 Ind. 583, 164 N. E. 315 (1929); *Callahan v. State*, 42 Okla. Cr. 425, 276 Pac. 494 (1929).

727. *People v. Grod*, 385 Ill. 584, 53 N. E. 2d 591 (1944); *Davis v. State*, 113 Tex. Cr. 421, 21 S. W. 2d 509 (1929). Relying on a dictum in *State v. Evans*, 145 Wash. 4, 13, 258 Pac. 845, 849 (1927), in which the search was with consent, the Washington court held otherwise. *State v. Beaupre*, 149 Wash. 675, 272 Pac. 26 (1928).

728. *Matthews v. Correa*, 135 F. 2d 534 (2d Cir. 1943).

729. *Harris v. United States*, 331 U. S. 145, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947).

730. *State v. Carenza*, 357 Mo. 1172, 212 S. W. 2d 743 (1948). The arrestee had been taken away and various officers engaged in the search but they were "continuously searching" during the entire time.

## 6. What May Be Seized

As a result of a search properly incident to a lawful arrest the searcher is authorized to seize (1) "weapons or tools, keys and the like"<sup>731</sup> which might be used to effect an escape; (2) "contraband"<sup>732</sup> such as an illicit still the very possession of which is criminal;<sup>733</sup> (3) "the fruits of crime such as stolen property";<sup>734</sup> (4) the "instrumentalities and means"<sup>735</sup> by which the crime was committed; and (5) any article which "might tend to evidence his guilt of the offense for which the arrest has been made."<sup>736</sup>

*Money.* Where it appears that money found upon the person of the arrestee is the fruit of the crime for which he was arrested, it may be seized by the apprehending officer.<sup>737</sup> But if money so found is not the fruit of the crime, nor in any way connected therewith or evidence thereof, it may not be seized incident to the arrest.<sup>738</sup>

*Property connected with a different crime.* An officer conducting an au-

731. *Elliott v. State*, 173 Tenn. 203, 208, 116 S. W. 2d 1009, 1011 (1938); see *Hughes v. State*, 145 Tenn. 544, 566-67, 238 S. W. 588, 594 (1921).

732. *Harris v. United States*, 331 U. S. 145, 155, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947); see Note, 1 VAND. L. REV. 60 (1947).

733. *Reynolds v. State*, 136 Miss. 329, 101 So. 485 (1924).

734. *Harris v. United States*, 331 U. S. 145, 154, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947).

735. *Ibid.*

736. *Elliott v. State*, 173 Tenn. 203, 208, 116 S. W. 2d 1009, 1011 (1938); see *Hughes v. State*, 145 Tenn. 544, 566-67, 238 S. W. 588, 594 (1921). The Supreme Court of the United States has cast doubt on the privilege of federal officers to seize property having evidential value only. "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, . . ." *Harris v. United States*, 331 U. S. 145, 154, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947). The seizure of such articles, however, has long been recognized. "It is a general rule, upheld by the great majority of the cases upon the subject, that a peace officer, while executing a criminal process, may take possession of articles for the purpose of evidence, and hold them for such purpose; and the officer will not be liable for trespass in so doing, nor is the owner entitled to recover possession thereof." Note, 18 L. R. A. (N.S.) 253-54 (1900). In addition to the Tennessee cases, *supra*: *Northern v. State*, 216 S. W. 2d 192 (Tex. Cr. 1948); *Rex v. O'Donnell*, 7 Car. & P. 138, 173 Eng. Rep. 61 (N. P. 1835); *Regina v. Kinsey*, 7 Car. & P. 447, 173 Eng. Rep. 198 (N. P. 1836); *Rex v. Rooney*, 7 Car. & P. 515, 173 Eng. Rep. 228 (N. P. 1836).

Under a search warrant for intoxicating liquors and articles for their manufacture officers discovered liquor and also a ledger showing inventories of liquor and receipts relating to the business. They also found bills for utilities relating to the business. All of these articles were seized. It was held proper to seize the liquor under the search warrant and the other articles incident to the arrest which was made when the liquor was found. *Marron v. United States*, 275 U. S. 192, 48 Sup. Ct. 74, 72 L. Ed. 231 (1927).

As mentioned in discussing "constitution and statutes" the Tennessee Code has no section dealing with search and seizure by the apprehending officer, but leaves this entire field to the common law. But the section dealing with search and seizure on oral order of the magistrate, and in his presence, speaks of "a dangerous weapon, or anything which may be used as evidence of the commission of the offense. . . ." § 11914. Weapons unlawfully carried by an arrestee are forfeited to the state, county or municipality. § 11018. They must not be returned to the arrestee. § 11019.

737. *Rex v. Rooney*, 7 Car. & P. 515, 173 Eng. Rep. 228 (N. P. 1836); *Rex v. Burgess*, 7 Car. & P. 488, 173 Eng. Rep. 217 (N. P. 1836).

738. *Ex parte Hurn*, 92 Ala. 102, 9 So. 515 (1891); *Stuart v. Harris*, 69 Ill. App. 668 (1897); *Hubbard v. Garner*, 115 Mich. 406, 73 N. W. 390 (1897); *Harawitz v. Murray*, 123 Misc. 301, 205 N. Y. Supp. 230 (Sup. Ct. 1924); *Rickers v. Simcox*, 1 Utah 33 (1876); *Rex v. Barnett*, 3 Car. & P. 600, 172 Eng. Rep. 563 (N. P. 1829).

thorized search incident to arrest may unexpectedly find property having no bearing upon the crime for which the arrest was made, but intimately connected with some entirely different crime. Is he authorized to seize it? There has been some confusion on this point based upon the premise that the privilege to search incident to arrest is no greater than under a search warrant. The premise is sound, and a search under a search warrant does not authorize the seizure of anything not specified therein.<sup>739</sup> But if a search under a search warrant discloses some theretofore unsuspected offense which is then being committed by the offender who is there at the time, the officers are authorized to arrest him for that crime being committed in their presence and to seize the article discovered as an incident of this arrest.<sup>740</sup> Hence the sound rule is that officers making an authorized search following an arrest without a warrant are privileged to seize property having no relation to the offense for which the arrest was made, but intimately connected with some other crime, if such property is unexpectedly discovered.<sup>741</sup> Needless to say it must be an authorized search. The arrest of a motorist for speeding does not authorize a search of the luggage compartment of his car and the evidence of some other offense discovered by such an illegal search could not lawfully be seized.<sup>742</sup> On the other hand one arrested for public drunkenness may be searched for weapons, as a safety precaution, and if a concealed weapon is found on his person it may be seized and used as the basis of a prosecution for unlawfully carrying a pistol.<sup>743</sup>

### 7. Protective Custody

The fact that the normal rules of search and seizure incident to arrest do not include money or other property in no way connected with the crime

739. *Marron v. United States*, 275 U. S. 192, 48 Sup. Ct. 74, 72 L. Ed. 231 (1927); *People v. Preuss*, 225 Mich. 115, 195 N. W. 684 (1923); *Cofer v. State*, 152 Miss. 761, 118 So. 613 (1928); *State v. Muetzel*, 121 Ore. 561, 254 Pac. 1010 (1927).

740. *Harris v. United States*, 331 U. S. 145, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947); *Marron v. United States*, 275 U. S. 192, 48 Sup. Ct. 74, 72 L. Ed. 231 (1927); *Reynolds v. State*, 136 Miss. 329, 101 So. 485 (1924); *State v. Muetzel*, 121 Ore. 561, 254 Pac. 1010 (1927); *State v. McKindel*, 148 Wash. 237, 268 Pac. 593 (1928).

741. *Goodwin v. State*, 148 Tenn. 682, 257 S. W. 79 (1923); *State v. Turner*, 302 Mo. 660, 259 S. W. 427 (1924); *People v. Chiagles*, 237 N. Y. 193, 142 N. E. 583 (1923); *State v. Flanagan*, 251 Wis. 517, 29 N. W. 2d 771 (1947); *Gray v. State*, 243 Wis. 57, 9 N. W. 2d 68 (1943). "We adhere to the rule heretofore followed by this Court that, when the scope of the search is confined within lawful limits, discoveries of independent offenses may be testified to in prosecution of such offenses." *Elliott v. State*, 173 Tenn. 203, 211, 116 S. W. 2d 1009, 1013 (1938).

An officer arresting for larceny of an automobile found that the owner of the car had been murdered by being kicked to death, and the arrestee was wearing bloody shoes and socks. These were admitted in evidence and a conviction of murder was affirmed. *Northern v. State*, 216 S. W. 2d 192 (Tex. Cr. 1948). Officers arresting under a bench warrant may seize evidence of another crime found as a result of a search incident to the arrest. *United States v. Petti*, 168 F. 2d 221 (2d Cir. 1948).

742. *Elliott v. State*, 173 Tenn. 203, 116 S. W. 2d 1009 (1938). But an arrest for driving while intoxicated would authorize a search of the car for liquor. *Fuqua v. State*, 175 Tenn. 11, 130 S. W. 2d 125 (1939).

743. *Goodwin v. State*, 148 Tenn. 682, 257 S. W. 79 (1923).

for which the arrest was made, or some other crime, and not usable as a weapon or other means of escape, does not mean that these may never be taken by an apprehending officer under any circumstances. An officer making an arrest has a duty to take reasonable steps to protect property of the arrestee, if it is in danger of being lost, damaged or stolen,<sup>744</sup> and protective measures can be taken without personal danger or risk of losing custody of the arrestee. If, for example, one arrested for drunkenness and disorderly conduct is so intoxicated at the time as to be incapable of properly caring for the money or valuables on his person, the officer is authorized to take charge of them for safe-keeping.<sup>745</sup> And an officer who arrests a motorist may take control of the car sufficiently to remove it to a place of safety.<sup>746</sup> Furthermore, if the arrestee is to be locked up, his money and other valuables may be placed in the jail safe as a safety precaution.

This important distinction must be noted: Money or property seized under the normal rules of search and seizure incident to arrest is to be kept in the custody of the law until the case is disposed of or there is a court order of release; but that which is taken merely for safe-keeping must be returned at once if the arrestee is released on bail, and must be available to him, if necessary, even during incarceration, as where money is used, at his request, for the employment of counsel.<sup>747</sup>

#### D. Disposition of Prisoner

Since the purpose of lawful arrest is to take the prisoner before a court, body or official, or otherwise to secure the administration of the law, this is exactly what must be done,—<sup>748</sup> with one exception. The exception is in case of an arrest of an innocent person, which is lawful when made because of the reasonable belief of the arrester, who thereafter learns facts sufficient to establish the innocence of the one in custody. Since the very basis which made the apprehension lawful in the beginning has now disappeared, the arrestee should be released at once, unless he indicates a desire to be taken before a

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744. *Patrick v. Commonwealth*, 199 Ky. 83, 250 S. W. 507 (1923). For the liability of an officer, or other person, for loss of property left unprotected when the owner is wrongfully arrested, see Note, 5 A. L. R. 362 (1920). For the special provision relating to arrest of one in charge of a vehicle drawn by an animal, or containing an animal, see § 5101.

745. *Connolly v. Thurber-Whyland Co.*, 92 Ga. 651, 18 S. E. 1004 (1893).

746. *Patrick v. Commonwealth*, 199 Ky. 83, 250 S. W. 507 (1923); *Toliver v. State*, 133 Miss. 789, 98 So. 342 (1923); *Reynolds v. State*, 106 Tex. Cr. 391, 293 S. W. 178 (1927). In *Patrick v. Commonwealth*, *supra*, it was held that if the arrestee has his car nearby, with the motor running, the officer has a duty to remove it to a place of safety, and being in possession of the car, may search it. This should be compared with a Missouri case in which it was held that an officer, to whom an arrestee gave the car keys for the sole purpose of having it removed to a place of safety, was not authorized to seize the car or property therein. *State v. Jones*, 214 S. W. 2d 705 (Mo. 1948).

747. *Harawitz v. Murray*, 123 Misc. 301, 205 N. Y. Supp. 230 (Sup. Ct. 1924).

748. 2 HALE P. C. \*119; 4 BL. COMM. \*296.

magistrate.<sup>749</sup> Although the original arrest was lawful it would be unlawful to detain him longer, contrary to his desire, just for the purpose of taking him before a magistrate.<sup>750</sup> Such a case can arise in either of two different ways: (1) By an arrest on reasonable suspicion of felony, after which the arrester learns additional facts which clearly disprove the guilt of his prisoner; (2) by an arrest under a warrant by one who reasonably believes at the time that the arrestee is the person intended thereby, but who learns before taking him to the magistrate that the warrant was issued for a different person of the same name.<sup>751</sup> On the other hand, if an officer has a warrant for the arrest of a certain person it is his duty to arrest him, if he can, even if he knows that this person is in fact innocent of the offense charged.<sup>752</sup> An officer with a warrant which uses a name applicable to two or more must use due care in the effort to apprehend the one intended;<sup>753</sup> but where the name singles out one person from all others the officer has no discretion.<sup>754</sup>

### 1. No Commitment Until Examination

The common law requirement that the ordinary arrestee shall be taken before a magistrate for examination<sup>755</sup> is codified in this form: "No person shall be committed to prison for any criminal matter, until examination thereof be first had before some magistrate."<sup>756</sup> This does not prevent the locking

749. *Burke v. Bell*, 36 Me. 317 (1853); RESTATEMENT, TORTS § 134, comment *f*, and § 136, comments *e* and *f* (1934).

750. There is no false imprisonment if the arrestee is released when his innocence is established. *Mooradian v. Davis*, 302 Mich. 484, 5 N. W. 2d 435 (1942); *Pine v. Okzewski*, 112 N. J. L. 429, 170 Atl. 825 (1934); *Peloquin v. Hibner*, 231 Wis. 77, 285 N. W. 380 (1939).

One writer has said that it is illegal in Massachusetts to release an arrestee in such a case without taking him before a magistrate. Warner, *Investigating the Law of Arrest*, 31 J. CRIM. L. AND CRIMINOLOGY 111, 120 (1940); cf. *Keefe v. Hart*, 213 Mass. 476, 100 N. E. 558 (1913); see also Bohlen and Shulman, *Effect of Subsequent Misconduct upon a Lawful Arrest*, 28 COL. L. REV. 841 (1928). But cf. 2 HALE P. C. \*96-98; 2 HAWK. P. C., c. 12, § 20, c. 13, § 5 (6th ed., Leach, 1788). Such a position is quite unsound. The innocent arrestee should not be deprived of his liberty for the additional time required to take him before a magistrate when the officer is no longer in a position to file a complaint against him. On the other hand, the officer should take the arrestee before a magistrate if that is his desire. RESTATEMENT, TORTS § 136, comment *f* (1934).

751. RESTATEMENT, TORTS § 134, comment *f* (1934).

752. *Id.* at § 123, comment *a* (1934). The reason for this rule is that probability of guilt has been considered and acted upon by the issuing magistrate and the officer must not override the magistrate's determination on this point. A different rule would induce the officer to abandon the arrest in cases in which he mistakenly *thought* the one accused in the warrant was innocent.

753. *Id.* at § 125, comment *d*.

754. *Id.* at § 123, comment *a*.

755. "When a delinquent is arrested . . . he ought regularly to be carried before a justice of the peace; . . ." 4 BL. COMM. \*296. "When he hath brought him to the justice, yet he is in law still in his custody, till either the justice discharge or bail him, or till he be actually committed to the gaol by warrant of the justice." 2 HALE P. C. \*120.

756. § 11515. The magistrate "is authorized to discharge, bail, or commit the accused . . ." as a result of his examination. § 11516. In the early history of the state the power to commit was granted by statute to sheriffs, in certain instances; but under the existing laws the power to commit and to order the release of persons is vested in justices of the peace and the courts. See *Lynch v. Jackson County*, 131 Tenn. 72, 73,

up of an arrestee temporarily where this is a reasonable step while awaiting an opportunity to take him before a magistrate,<sup>757</sup> because such detention is not within the meaning of the word "commitment" as so used.<sup>758</sup> And when it becomes necessary to adjourn the examination, the accused may "be committed to jail in the meantime" by express authorization of another section.<sup>759</sup> The section quoted, moreover, does not prevent commitment without examination if the arrest is of one who has been indicted,<sup>760</sup> or convicted,<sup>761</sup> or is rearrested after giving bail.<sup>762</sup>

On the other hand, one who has been arrested prior to indictment, whether with or without a warrant, must not be locked up except as a temporary expedient. Even the authority of a magistrate to order the arrest of one committing an offense in his presence<sup>763</sup> does not entitle him to commit the offender to imprisonment without a hearing.<sup>764</sup>

## 2. Time of Examination

The warrant of arrest commands the officer to proceed "forthwith."<sup>765</sup> This word does not require the officer to forsake all other duties and execute the warrant instantly under any and all circumstances, but it does require him to proceed without unnecessary delay.<sup>766</sup> However, a study of the form suggested in the code discloses that the word "forthwith" refers to the arrest itself and not to the disposition of the arrestee.<sup>767</sup>

"A private person who has arrested another for a public offense, shall,

173 S. W. 440, 441 (1914). An arrestee may waive an examination and this will obviate the need of examining witnesses and reducing their testimony to writing. *State ex rel. v. Miller*, 69 Tenn. 596 (1878). But the waiver should be in the presence of the magistrate.

757. *State ex rel. Morris v. National Surety Company*, 162 Tenn. 547, 39 S. W. 2d 581 (1931).

758. "By the word 'commitment' is meant the process directed to a ministerial officer by which a person is to be confined in prison, usually issued by order of a court or magistrate." *Lynch v. Jackson County*, 131 Tenn. 72, 73, 173 S. W. 440, 441 (1914); cf. *Wynn v. State*, 181 Tenn. 325, 181 S. W. 2d 332 (1944).

759. § 11550.

760. The return of an indictment authorizes issuance of a *capias* for the arrest without the necessity of preliminary examination and commitment, and in the absence of an order allowing bail it authorizes confinement of the accused until brought to trial. *Shaw v. State*, 164 Tenn. 192, 47 S. W. 2d 92 (1932). The *capias* is provided for in §§ 11608-11611. As to bail on such arrest, see §§ 11612-11616 and §§ 11651 *et seq.* For rearrest after giving bail, see §§ 11711-11713.

761. § 11714. If the arrest is of one who has escaped from jail or prison, after conviction, or after an order of commitment, no examination is needed before his return to the place from which he escaped; but as to authority to arrest one who has escaped see *McCaslin v. McCord*, 116 Tenn. 690, 94 S. W. 79 (1906).

762. For the statutes on rearrest after giving bail see §§ 11711-11715.

763. § 11535.

764. *Touhey v. King*, 77 Tenn. 422 (1882).

765. § 11523.

766. *Winston v. Commonwealth*, 188 Va. 386, 49 S. E. 2d 611 (1948). "It shall be the duty of the sheriff: . . . (7) to use in the execution of process, a degree of diligence exceeding that which a prudent man employs in his own affairs. . . ." § 10106.

767. The wording is: "You are, therefore, commanded, in the name of the state, forthwith to arrest C D, and bring him before me. . . ." § 11523.



without unnecessary delay, take him before a magistrate or deliver him to an officer."<sup>768</sup> There is no corresponding provision with reference to an arrest by an officer.<sup>769</sup> The officer is unquestionably privileged to lock up an arrestee until a magistrate is available if the arrest is at night or on Sunday and no magistrate is then at hand in the county;<sup>770</sup> or to confine him until he is in proper condition for a hearing if he is intoxicated,<sup>771</sup> or until the danger to him is past if there is threat of mob violence;<sup>772</sup> or to keep him under "house arrest" in a hospital, or even in his own home, if he is too ill at the moment to be moved,<sup>773</sup> because this could be done even if there were a provision requiring the officer to act in this regard without "unnecessary delay."<sup>774</sup>

The absence of a statutory provision in this regard does not authorize the officer to detain an arrestee arbitrarily or indefinitely. He must take him before a magistrate without unreasonable delay under the general requirement that there shall be no commitment until examination.<sup>775</sup> There is a difference, however, between an *unnecessary* delay and an *unreasonable* delay. If it is important to postpone taking an arrestee before a magistrate in order to question him, with reference to the offense, this delay is not necessary,<sup>776</sup> but on the other hand it may be reasonable if not unduly prolonged.<sup>777</sup>

768. § 11544. The officer is expressly authorized to take such an arrestee before a magistrate. This places the entire responsibility for the arrest upon the private person who made it. The requirement that a private person making an arrest shall take the arrestee promptly to a magistrate or deliver him to an officer may be waived by the arrestee. *Reed v. Hutton*, 1 Tenn. App. 36 (En Banc 1925).

769. *See Wynn v. State*, 181 Tenn. 325, 330, 181 S. W. 2d 332, 334 (1944).

770. *King v. Robertson*, 227 Ala. 378, 150 So. 154 (1933); *People v. Scott*, 401 Ill. 80, 81 N. E. 2d 426 (1948); *Oxford v. Berry*, 204 Mich. 197, 170 N. W. 83 (1918); *State v. Yearwood*, 37 So. 2d 174 (Miss. 1948); *Samuel v. Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K. B. 1780); see *State ex rel. Morris v. National Surety Company and Bragg*, 162 Tenn. 547, 554, 39 S. W. 2d 581, 583 (1931); 2 HALE P. C. \*96; 2 HAWK. P. C., c. 12, § 20 (6th ed., Leach, 1788); 4 BL. COMM. \*292.

771. *Scircle v. Neeves*, 47 Ind. 289 (1874); *Hutchinson v. Sangster*, 4 Greene 340 (Iowa 1854); *State v. Yearwood*, 37 So. 2d 174 (Miss. 1948); *State v. Freeman*, 86 N. C. 683 (1882). But if the arrest is for operating a motor vehicle while intoxicated and the arrestee, who claims he is not drunk, is detained without being given an opportunity to establish the facts in this regard until it is too late to do so, the detention is unlawful. *Winston v. Commonwealth*, 188 Va. 386, 49 S. E. 2d 611 (1948). Statutes sometimes make special provision for arrest of one who is drunk. *Shepherd v. City of Richmond*, 306 Ky. 595, 208 S. W. 2d 744 (1948).

772. *Smith v. Amrine*, 156 Kan. 486, 134 P. 2d 400 (1943).

773. "Yet if the party so arrested be sick and cannot be removed without danger of death, he may detain him in his own house, till he can reasonably bring him to a justice or officer, 2 E. 4.8.b." 2 HALE P. C. \*81. See also *id.* at 95-96.

774. One arrested for robbery, without a warrant, was lodged in jail Sunday evening. A federal complaint was filed against him early the next morning and arrangements were made to have him taken before a United States Commissioner as soon as possible thereafter. This met the requirements of the federal rule of criminal procedure that one arrested without a warrant shall be taken before a commissioner without unnecessary delay. *In re Morgan*, 80 F. Supp. 810 (N. D. Iowa 1948). But where the arrest was on Sunday and the criminal court was open on Monday, although it was a legal holiday, it was unlawful to delay taking the arrestee into court until Tuesday. *Burns v. District of Columbia*, 34 A. 2d 714 (D. C. Mun. Ct. App. 1943).

775. § 11515.

776. *Upshaw v. United States*, 69 Sup. Ct. 170 (U. S. 1948), 2 VAND. L. REV. 472 (1949).

777. *Ford v. State*, 184 Tenn. 443, 201 S. W. 2d 539 (1945); *McGhee v. State*, 183

Under the federal rule requiring an arrestee to be taken before a commissioner, or other committing magistrate "without unnecessary delay,"<sup>778</sup> a confession is unlawfully obtained if the hearing has been postponed for the purpose of getting it.<sup>779</sup> In Tennessee, without such a requirement, officers may delay taking the arrestee before a magistrate in order to have reasonable opportunity to investigate the case,<sup>780</sup> and the fact that a confession is ob-

Tenn. 20, 189 S. W. 2d 826 (1945); *Wynn v. State*, 181 Tenn. 325, 181 S. W. 2d 322 (1944); *People v. Scott*, 401 Ill. 80, 81 N. E. 2d 426 (1948); *Pine v. Okzewski*, 112 N. J. L. 429, 170 Atl. 825 (1934); *Mulberry v. Fuellhart*, 203 Pa. 573, 53 Atl. 504 (1902); *Peloquin v. Hibner*, 231 Wis. 77, 285 N. W. 380 (1939). *Contra*: *Keefe v. Hart*, 213 Mass. 476, 100 N. E. 558 (1913). The Wisconsin court said: "The defendants and the District Attorney were entitled to a reasonable time on Tuesday, June 1st, as a matter of law, to determine whether to make a formal complaint against the plaintiff or release her from custody." 231 Wis. at 86-87, 285 N. W. at 385.

778. FED. R. CRIM. P., 5(a).

779. *Upshaw v. United States*, 69 Sup. Ct. 170 (U. S. 1948), 2 VAND. L. REV. 472 (1949); *McNabb v. United States*, 318 U. S. 332, 63 Sup. Ct. 608, 87 L. Ed. 819, (1943). The fact that the arrestee was not taken before the commissioner until eight days after arrest did not bar the use of a confession obtained within a few minutes after arrival at the police station. *United States v. Mitchell*, 322 U. S. 65, 64 Sup. Ct. 896, 88 L. Ed. 1140 (1944).

The purpose of the federal requirement that arrestee shall be promptly taken before committing authority, as explained by the Supreme Court, is to avoid all evil implications of secret interrogation of persons accused of crime, and constitutes an important safeguard, not only in procuring protection for the innocent, but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. *See McNabb v. United States*, 318 U. S. 332, 343-44, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943). This seems to be based upon a misunderstanding, either of the so-called "examination" by the magistrate, or of human nature. There was a time in English history when magistrates conducted real inquisitions, interrogating both witnesses and persons accused of crime. A. L. I. CODE OF CRIMINAL PROCEDURE 266 (Official Draft with Commentaries 1931). But today the magistrate must warn the accused that he is not required to say anything and if he does speak any statement made by him may be used against him. The usual "examination" by the magistrate is merely a hearing to determine if there is enough evidence against the accused to justify holding him in custody or on bail. Any effective examination must precede this hearing.

"The . . . infrequency of spontaneous, unsolicited confessions and the necessity for interrogations under conditions of privacy and for a reasonable period of time—is one which should be readily apparent not only to any person with the least amount of criminal investigative experience, but also to anyone who will reflect momentarily upon the behavior of ordinary law-abiding persons when suspected or accused of nothing more than simple social indiscretions. Self-condemnation and self-destruction not being normal behavior characteristics, human beings ordinarily do not utter unsolicited, spontaneous confessions. . . . It is also impractical to expect admissions or confessions to be obtained under circumstances other than privacy." Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 449-50 (1948).

"The . . . infrequency of spontaneous, unsolicited confessions and the necessity for Penal Reconstruction and Development provides, among other things: That an arrestee "shall be brought before the appropriate magistrate as soon as practicable but in no case later than three days after arrest, exclusive of public holidays and exclusive of the time required for the journey from the place of arrest in either case." It also provides that no confession shall be admissible unless shown to be free from any taint of promise or threat. Glaser, *A Draft Code of Minimum Rules for the Treatment of Persons Suspected or Accused of Crimes*, in 1 J. OF CRIM. SCI. 157, 159-60 (Radzinowicz & Turner eds. 1948).

780. "It was also proper that he should investigate for the purpose of ascertaining whether he should be held." *Terry v. Burford*, 131 Tenn. 451, 465, 175 S. W. 538, 541 (1914).

Detention of the arrestee from 6:30 P.M. until 11:00 P.M. for the purpose of examination was not unlawful, even though it was then too late to take him before a magistrate until the following morning. *People v. Scott*, 401 Ill. 80, 81 N. E. 2d 426 (1948). Detention of arrestee from Tuesday noon until 3 o'clock Thursday afternoon, at which time

tained during such an investigation does not make it unlawful if it was entirely free and voluntary.<sup>781</sup> Needless to say, the confession is inadmissible in evidence if it was obtained under violence or threat of violence or promise of leniency.<sup>782</sup> Furthermore, long detention without sleep or rest, during which time the arrestee is subjected to continuous questioning by relays of

he was released without having been taken before a magistrate, could not be said as a matter of law to be unlawful. This was properly left to the jury who found that the detention was not unreasonable. *Mooradian v. Davis*, 302 Mich. 484, 5 N. W. 2d 435 (1942). Under New Jersey statutes it was a misdemeanor for any automobile operator to fail to secure and carry a driver's license, exempting for 90 days, however, a non-resident who had complied with the laws of his own state. A nonresident driving through New Jersey was taken to a station house by an officer while he investigated the claim that the state of the driver's residence required no license. After a delay of an hour or two the statement was verified and the driver was released. A judgment against the officer in an action for false imprisonment was reversed on the ground that it was lawful to detain him for a reasonable time while his status in his own state was being determined. *Pine v. Okzewski*, 112 N. J. L. 429, 170 Atl. 825 (1934).

It is sometimes assumed that the common law gave no authority to the arrestor to investigate the case before taking his prisoner before a magistrate. See, for example, *Bohlen and Shulman, Effect of Subsequent Misconduct upon a Lawful Arrest*, 28 Col. L. Rev. 841, 852-53 (1928). In fact, watchmen were authorized to apprehend "persons suspected of felony" at night and keep them in custody till morning. 2 HALE P. C. \*98. This power extended even to unidentified "night-walkers." *Id.* at \*96. "And if no suspicion be found, he shall go quit; and if they find cause of suspicion, they shall forthwith deliver him to the sheriff, and the sheriff . . . shall keep him safely until he be acquitted in due manner." 2 HAWK. P. C., c. 13, § 5 (6th ed., Leach, 1788). And the constable was expected to search for "night-walkers and persons suspicious either by night or day. . . ." 2 HALE P. C. \*97. Hawkins adds: "Yet it is holden by some, that any private person may lawfully arrest a suspicious night-walker, and detain him till he make it appear, that he is a person of good reputation." 2 HAWK. P. C., c. 12, § 20 (6th ed., Leach, 1788).

781. *Ford v. State*, 184 Tenn. 443, 201 S. W. 2d 539 (1945); *McGhee v. State*, 183 Tenn. 20, 189 S. W. 2d 348 (1945); *Wynn v. State*, 181 Tenn. 325, 181 S. W. 2d 332 (1944). In the *Wynn* case the arrestees were detained in the police station for three days before being taken before a magistrate. The questioning of defendant at the scene of the robbery was not improper where there was no suggestion of intimidation, threats or violence. *Barber v. State*, 62 A. 2d 616 (Md. 1948).

The Supreme Court of the United States said *obiter* that a detention by officers for six days, during which period they were questioned without being taken before a magistrate, was in violation of the Tennessee law. *Anderson v. United States*, 318 U. S. 350, 355, 63 Sup. Ct. 599, 87 L. Ed. 829 (1943). The arrest in this case was without a warrant, and for a misdemeanor not committed in the presence of the apprehending officers, and hence was in violation of the Tennessee law from the very beginning. § 11536.

Kentucky has gone to the opposite extreme by statute. "No police officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions. . . . A confession obtained by methods prohibited by Section one is not admissible as evidence of guilt in any court. . . ." KY. REV. STAT. ANN. § 422.110 (Baldwin, 1943). This does not bar a confession given by an arrestee before arraignment, without being questioned. *Commonwealth v. Mayhew*, 297 Ky. 172, 178 S. W. 2d 928 (1944).

782. *Williams v. State*, 212 S. W. 2d 383 (Tenn. 1948); *Polk v. State*, 170 Tenn. 270, 94 S. W. 2d 394 (1936). And see *Churn v. State*, 184 Tenn. 646, 651, 202 S. W. 2d 345, 347 (1947). "We now go further than we have found occasion to go in any reported case heretofore and lay down the rule that, when it appears beyond reasonable doubt that an officer, unless in self-defense, or so required to prevent the escape of one charged with a felony, has physically assaulted a prisoner while in his care, thus violating his official obligation, the criminal law and the constitutional rights of the prisoner, his testimony, and that of his associate officers present without protest at the time, will be received with great caution. The testimony of officers of the law who so far disregard their obligations, while admissible, will not be given favorable consideration in the determination of the case." 184 Tenn. at 652, 202 S. W. 2d at 347.

officers, will be so coercive as to render a confession obtained thereby inadmissible.<sup>783</sup>

*Detention with consent.* Officers with authority to arrest without a warrant on reasonable suspicion of felony may, if the arrestee voluntarily consents thereto, lock him in jail for such period as may be agreed upon without filing a formal charge against him.<sup>784</sup> The arrestee might be glad to give this consent rather than have a criminal charge filed against him then. Such custody with consent should be no longer than a day or two in the first instance. It can be extended at the end of that time if the arrestee is still willing.

*Holding on other charges.* Another point to be borne in mind by an officer who wishes to hold a person in custody while conducting an investigation is that it is sometimes possible to arrest him on some other charge while the evidence is still insufficient to take him into custody as far as the principal offense is concerned. Officers, for example, may be investigating a charge so serious that they feel they have no time at the moment to enforce the law against minor misconduct, such as vagrancy.<sup>785</sup> But if they arrest all of those near the scene of the crime who are guilty of vagrancy, and push these cases to prompt convictions, they may find the perpetrator already in custody when the major offense is solved. In a Wisconsin case, for example, officers investigating a burglary arrested three negroes for vagrancy. A search of their car as an incident to this arrest disclosed the "loot" taken during the burglary.<sup>786</sup>

### 3. Holding Incommunicado

The bare statement that a certain person was arrested and held for several hours before being permitted to communicate with his friends may sound to the layman like an outrageous infringement of personal liberty. And it would constitute such infringement if done without proper reason. But the officer charged with the protection of life and property in the community sometimes has very good reason for this procedure. Perhaps an arrest has suddenly cleared up a whole series of crimes, and has implicated the various members of a certain gang. The arrestee demands an opportunity to put in a telephone call. His pretext sounds innocent enough. He may say he was going to meet his wife on a certain corner and merely wishes to explain his inability to keep the appointment; but the experienced officer has reason to know that if this innocent-sounding message is put through before the other

783. *Rounds v. State*, 171 Tenn. 511, 106 S. W. 2d 212 (1937); *Ashcraft v. Tennessee*, 322 U. S. 143, 64 Sup. Ct. 921, 88 L. Ed. 1192 (1944). And see *Wynn v. State*, 181 Tenn. 325, 181 S. W. 2d 332 (1944), in which the court emphasizes that there was no such continuous grilling of the defendant in that case.

784. *Peloquin v. Hibner*, 231 Wis. 77, 285 N. W. 380 (1939).

785. § 5248. "Arrests for vagrancy constitute a large percentage of the total arrests for all crimes, particularly in the large cities; . . ." Note, *Who Is a Vagrant in California?* 23 CALIF. L. REV. 506 (1935); and see Note, *A Reply to "Who Is a Vagrant in California?"* 23 CALIF. L. REV. 616 (1935).

786. *Gray v. State*, 243 Wis. 57, 9 N. W. 2d 68 (1943).

members of the gang are apprehended, they will have disappeared, when sought to be arrested. The circumstances also may make it clear that important evidence needed for conviction must be secured before this telephone call is made, or it will never be found; and in extreme instances there may be witnesses whose very lives will be in obvious danger if this communication is permitted too soon.<sup>787</sup>

Even officers who have given the greatest thought and study to ways and means of giving the utmost protection to the rights of the individual, have encountered situations in which the need of holding a prisoner for a short time, without giving him any possible opportunity of getting word to accomplices, was so great it would seem like criminal neglect of duty not to do so. Hence sound police practice indicates that officers should have authority to hold a prisoner incommunicado for a short period after his arrest whenever this reasonably seems necessary (1) to prevent the disappearance of other offenders whose arrest is diligently being sought, (2) to prevent the destruction or disappearance of evidence before the officers are able to find and take charge of it, (3) to safeguard the lives of important witnesses until the officers have the whole situation well in hand, or (4) to get to the bottom of the offense being investigated. The Tennessee court has indicated its approval of this procedure in extreme cases.<sup>788</sup>

#### 4. Questions Before Arrest

Quite the opposite of holding incommunicado is the practice of interrogating a suspect without taking him into custody,—or at least without doing so at the beginning. An officer with a warrant of arrest who comes upon the person named in the warrant, and known to him to be such, has the duty to make the apprehension at once. On the other hand, an officer without a warrant, who is authorized to arrest on reasonable suspicion of felony, may ask questions before he takes the person into custody.<sup>789</sup> It may be, for example, that although he has reasonable grounds for believing this to be the guilty party, the suspect may be able to establish his innocence. Since authority

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787. "Unquestionably there are a few exceptional situations when the Federal Bureau of Investigation should be permitted, subject to appropriate restrictions, to prolong incommunicado custody. In the first place, the interests of national defense occasionally require secrecy in the investigation of sabotage plots or treasonable activities. The ordinary mechanism of the arraignment statutes impedes effective investigation in numerous ways: committal is usually accompanied with publicity which may serve to warn members of a loosely-knit espionage gang, enabling them to escape, destroy damaging evidence, or even intimidate or kill witnesses for the government." Note, *Illegal Detention and the Admissibility of Confessions*, 53 YALE L. J. 753, 770 (1944).

788. In one case the arrestees were held incommunicado for three days. They were free from any physical harm and were not subjected to long periods of continuous questioning. Confessions were obtained at the end of this period. In holding these confessions admissible the court mentioned the holding incommunicado without criticism. *Wynn v. State*, 181 Tenn. 325, 181 S. W. 2d 332 (1944).

789. The possibility of questioning without arrest was discussed, *supra*, in Section II, "What Constitutes Arrest."

to arrest on suspicion of felony requires no more than reasonable grounds for believing the arrestee guilty,<sup>790</sup> which requirement is satisfied if there is likelihood of such guilt,<sup>791</sup> much inconvenience would be caused to innocent persons and frequent delay would be encountered before apprehension of the guilty parties in many cases, if the practice was for officers to apprehend *without question* all who were suspected upon such reasonable grounds, and to require each suspect to stand trial. To avoid this inconvenience and delay the individual is frequently given an opportunity to be heard *before* he is arrested. In one case the officer may ask questions of the suspect wherever he may be found, and perhaps go with him here and there for verification of his statements. In another, he may give him the choice between being arrested or going voluntarily to headquarters for questioning there. An *innocent* man should welcome the opportunity to establish his innocence without arrest, even if considerable delay and inconvenience may be involved.<sup>792</sup> If the suspect is unable to dispel the suspicion that has reasonably centered upon him, he is arrested.

### 5. Warning

At the preliminary hearing the magistrate has the duty to advise the defendant of his right of counsel, of his right to make a statement or not to do so, and to warn him that any statement made by him might be used against him;<sup>793</sup> but neither the common law nor the code requires such a warning to be given by the apprehending officer.

### 6. Bail

The present problem is limited to the privileges and duties of an arrester and does not include the general problems of bail<sup>794</sup> or the cash deposit in lieu of bail<sup>795</sup> or the authority of the magistrate or the city court, clerk in

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790. *Maghan v. Jerome*, 88 F. 2d 1001 (D. C. Cir. 1937); *Welch v. State*, 30 Okla. Cr. 330, 236 Pac. 68 (1925).

791. RESTATEMENT, TORTS § 119, comment *j* (1934).

792. The "Arrest Act" drafted for the Interstate Commission on Crime includes a clause which will authorize a peace officer, under certain circumstances, to detain a criminal suspect for a short period without arrest. The period recommended for this purpose is not to exceed two hours. Arrest Act, § 2. As of April 1, 1949, this statute was not in force in Tennessee.

793. It is error to permit a magistrate to testify that the defendant admitted his guilt at the preliminary hearing if the magistrate did not advise the defendant of his right to counsel, of his right to make a statement or not to do so, and warn him that any statement made by him might be used against him. *Cross v. State*, 142 Tenn. 510, 221 S. W. 489 (1920); *Polk v. State*, 170 Tenn. 270, 94 S. W. 2d 394 (1936). If a prisoner is properly cautioned by an examining magistrate and warned that the evidence may be used against him, a confession made and reduced to writing by the magistrate may be read in evidence against the prisoner, subject to be impeached, however, as is other evidence. *Alfred v. State*, 32 Tenn. 580 (1853).

794. §§ 11652-11677.

795. §§ 11678-11682.

this regard.<sup>796</sup> A private person has no authority to accept bail and release one arrested by him, and even an apprehending officer has no such authority except that given by statute.<sup>797</sup> The reason is that the magistrate must determine whether the offense is bailable or not,<sup>798</sup> and hence the apprehending officer has no authority to release the arrestee on bail if the arrest is prior to examination and commitment by the magistrate,<sup>799</sup> except that the sheriff, or his deputy,<sup>800</sup> or other apprehending officer,<sup>801</sup> may do so if the arrest is after indictment<sup>802</sup> and the amount of bail is prescribed by the court, magistrate, or officer having authority to admit to bail.<sup>803</sup>

### 7. Care of Prisoner

An arrester has a duty to treat his prisoner with "reasonable consideration" and "may not misuse his custody by any conduct which is clearly unnecessary to maintain it and which threatens bodily harm to the other or is grossly offensive to a reasonable sense of personal dignity or modesty."<sup>804</sup> He must never strike his prisoner unless this becomes necessary in self-defense or to prevent the escape of one charged with a felony.<sup>805</sup> And, unless necessary to maintain his custody, he must not force his prisoner to accompany him through the streets indecently clad, nor expose him to inclement weather insufficiently clad.<sup>806</sup> The statute forbids the use of open patrol wagons for the transportation of arrestees.<sup>807</sup>

If an arrestee is in obvious need of immediate medical or surgical attention the arrester must use reasonable diligence in the effort to see that such

796. §§ 11653-54 as amended in 1937. The "committing magistrate or sheriff and/or the city court clerk of any incorporated municipality or city or his deputies. . . ."

797. *State v. McCoy*, 60 Tenn. 111 (1873); *State v. Austin*, 23 Tenn. 213 (1843); *State v. Horn*, 19 Tenn. 473 (1838).

798. *State v. Horn*, 19 Tenn. 473 (1838).

799. *State v. McCoy*, 60 Tenn. 111 (1873).

800. *State v. Kizer*, 36 Tenn. 563 (1857). Prior to the act of 1845 (see *id.* at 564) it was held that the taking of bail could be done by the sheriff only. *State v. Edwards*, 23 Tenn. 226 (1841).

801. § 11610 (Tenn. Acts 1859-60, c. 96, § 2).

802. § 11654.

803. § 11659. To "admit to bail" must not be confused with "take bail." The former involves the determination of whether or not the offense is bailable and if so in what amount. As to bail in a case in which one who has been indicted is arrested by an officer not of the county to which the capias is returnable, see §§ 11615-11618. It may be necessary to rearrest one who has been released on bail. If it is because he failed to appear for judgment upon conviction he is committed accordingly. § 11714. "If the order be made for any other cause, and the offense be bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order, that the defendant be admitted to bail in the sum fixed which shall be specified in the order." § 11715.

804. RESTATEMENT, TORTS § 132, comment *b* (1934). The constitution provides: "That no person arrested and confined in jail shall be treated with unnecessary rigor." TENN. CONST. Art. I, § 13.

805. *Churn v. State*, 184 Tenn. 646, 202 S. W. 2d 345 (1947).

806. RESTATEMENT, TORTS § 132, comment *b* (1934).

807. § 3358.

help is made available to him.<sup>808</sup> And if mob violence is threatened reasonable steps should be taken for his protection.<sup>809</sup>

## VII. IMMUNITY FROM ARREST

"It is an important principle of our political institutions that every person is entitled to immunity from arrest except by authority and for cause."<sup>810</sup> On the other hand, no person, whether citizen or alien, resident or transient, is entirely exempt from arrest unless protected by some special immunity. A justice of the peace, for example, may be arrested for unlawfully drawing a weapon upon another;<sup>811</sup> a mail carrier may be arrested for murder,<sup>812</sup> violation of liquor laws,<sup>813</sup> or reckless driving;<sup>814</sup> and a United States marshal was subject to arrest for carrying a concealed weapon<sup>815</sup> before he was licensed to do so.<sup>816</sup>

### A. The Chief Executive

The President of the United States<sup>817</sup> and the governor of a state<sup>818</sup> are immune from arrest while in office, although the point is not free from con-

808. *State ex rel. Morris v. National Surety Co.*, 162 Tenn. 547, 39 S. W. 2d 581 (1931).

809. *Smith v. Amrine*, 156 Kan. 486, 134 P. 2d 400 (1943).

810. *Snead v. Bonnell*, 166 N. Y. 325, 328, 59 N. E. 899, 900 (1901). "The law jealously guards the liberty of the citizen, and a public officer has no right, because of being clothed with the habiliments of office, to interfere therewith save as provided." *State v. Small*, 184 Iowa 882, 885, 169 N. W. 116, 117 (1918).

811. *Gross v. State*, 186 Ind. 581, 117 N. E. 562 (1917).

812. *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278 (U. S. 1868).

813. *Penny v. Walker*, 64 Me. 430 (1874).

814. *United States v. Hart*, 26 Fed. Cas. 193, No. 15,316 (C. C. D. Pa. 1817).

815. *Walker v. Lea*, 47 Fed. 645 (C. C. N. D. Miss. 1891); *State v. Williams*, 72 Miss. 992, 18 So. 486 (1895); *State v. Hayne*, 88 N. C. 625 (1883).

816. 18 U. S. C. § 3053 (1948).

817. "The President cannot be arrested or restrained of his personal liberty, by anybody or anything, not even for the commission of murder. He is responsible only to the United States Senate. Upon descent from office he becomes immediately liable to prosecution for every crime or misdemeanor committed while in office." Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 564 (1924), quoting 2 BURGESS, *POLITICAL SCIENCE AND CONSTITUTIONAL LAW* 245. "The president or governor cannot be arrested. If the President of the United States should commit a grave crime in Illinois who could arrest him? What court could issue process to do so?" Wilgus, *supra* at 564, n. 177, quoting Hughes in 94 CENT. L. J. 104. "Chief Justice Marshall on the trial of Burr, vol. 2, p. 536, remarks: 'In no case of this kind would a court be required to proceed against the President, as an ordinary individual. The objections to such course are so strong and so obvious that all must acknowledge them.'" *Thompson v. German Valley Ry.*, 22 N. J. Eq. 111, 115 (Ch. 1871).

818. "The governor of the State constitutes one of the coordinate departments of the government. . . . No court can coerce him. No court can imprison him for failing to perform any act, or to obey any mandate of any court." *State ex rel. Latture v. Board of Inspectors*, 114 Tenn. 516, 519, 86 S. W. 319, 320 (1905). "As we do not possess any jurisdiction over the governor, we shall decline any further discussion of this cause, hold the demurrer well taken, and deny the issuance of the peremptory writ." *State ex rel. Robb v. Stone, Governor*, 120 Mo. 428, 25 S. W. 376, 378 (1894).

Lord Mansfield said: "For it is truly said that a governor is in the nature of a viceroy; and therefore locally, during his government, no civil or criminal action will lie against him: the reason is because upon process he would be subject to imprisonment." *Mostyn v. Fabrigas*, 1 Cowp. 161, 172-73, 98 Eng. Rep. 1021, 1028 (K. B. 1774). In



troverſy and in one caſe, at leaſt, a governor was arreſted.<sup>819</sup> Among the reaſons given for the ſound view recognizing this immunity are that the chief executive is the head of "one of the coordinate departments of the government,"<sup>820</sup> and there is no adequate ability to coerce him becauſe he commands the military forces of the ſtate.<sup>821</sup>

In another connection it has been truly ſaid: "No man in this country is ſo high that he is above the law. No officer of the law may ſet that law at defiance with impunity. All the officers of the Government, from the higheſt to the loweſt, are creatures of the law, and are bound to obey it."<sup>822</sup> The fact, however, that the preſident or the governor is bound to obey the law does not ſubject him to ordinary proceſs while in office. When he ceases to be the chief executive he is anſwerable for miſdeeds committed by him while he held that poſition. And if he overſteps the bounds too far he can be removed from office before the end of his term by impeachment.<sup>823</sup>

Impeachability does not neceſſarily mean immunity from arreſt, becauſe other officers liable to impeachment may be arreſted;<sup>824</sup> but in the caſe of the chief executive the only ſound procedure is to remove him from office, or wait until the end of the term, before making any attempt to take him into cuſtody. The judgment of impeachment "ſhall only extend to removal from office,

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a later caſe it was ſaid that Lord Maſfield's dictum was incorrect,—that an action would lie againſt the governor although it ſeems to have been conceded that he was immune from proceſs while in office. *Hill v. Bigge*, 3 Moore 465, 13 Eng. Rep. 189 (P. C. 1841). See Note, *Personal Liability of Governor*, L. R. A. 1915A, 175.

819. "On July 20, 1921, the grand jury of Sangamon County, Illinois, returned an indictment againſt Len Small, governor of the ſtate, charging him with embezzlement of public funds during a previous term as State Treasuſer. Counſel for Governor Small, appearing as *amici curiæ*, urged that the governor was immune from arreſt during his term of office and ſought to have the clerk of the court reſtrained from iſſuing a *capias*. The court decided that there was no ſuch immunity, and ordered the clerk to iſſue proceſs and the ſheriff to make the arreſt, unleſs the governor voluntarily ſubmitted to the juſdiction of the court." 35 HARV. L. REV. 185 (1921). The governor reſuſed to ſubmit and was arreſted. *Id.* at n. 1.

820. See *State ex rel. Latture v. Board of Inſpectors*, 114 Tenn. 516, 519, 86 S. W. 319, 320 (1905).

821. "An order . . . might preſent the ſtrange ſpectacle of a direction by the court to the executive forces of the government, to coerce and puniſh the chief executive officer of the State, who commands and controls the military forces that are ultimately relied upon for the maintenance of law and order." *Rice v. The Governor*, 207 Maſs. 577, 580, 93 N. E. 821, 823 (1911). This was ſaid by the court in reſuſing to iſſue a writ of mandamus againſt the governor, but the reaſon,—inability to coerce—would apply with equal force to a warrant of arreſt. "Were we, then, to permit the attempt to enforce this attachment, an unſeemly conflict muſt reſult between the executive and judicial departments of the government. We need not ſay that prudence would dictate the avoidance of a catastrophe ſuch as here indicated." *Appeal of Hartranft, Governor*, 85 Pa. 433, 446 (1877).

822. *United States v. Lee*, 106 U. S. 196, 220, 1 Sup. Ct. 240, 27 L. Ed. 171 (1882).

823. The ſole power of impeachment of federal officers is veſted in the Houſe of Representatives. U. S. CONST. Art. I, § 2, cl. 5. The Senate has the ſole power to try ſuch impeachments. *Id.* at § 3, cl. 6. The Tennessee provisions are the ſame. TENN. CONST. Art. V, §§ 1 and 2.

824. In addition to the governor, the judges of the ſupreme court, the judges of inferior courts, chancellors, attorneys for the ſtate, treasuſer, comptroller and ſecretary of ſtate are liable to impeachment. TENN. CONST. Art. V, § 4; § 11864. The reaſons for holding the governor immune to arreſt while in office do not apply to theſe officers.

and disqualification to fill any office thereafter." But it is expressly added: "The party shall, nevertheless, be liable to indictment, trial, judgment and punishment according to law."<sup>825</sup>

To proceed against the governor in a criminal action before removing him from office (if it were permitted) would involve an absurd predicament. The governor has the power to pardon, after conviction, except in cases of impeachment.<sup>826</sup> While a conviction of felony (other than manslaughter) and sentence to the penitentiary is a disqualification from holding any office under the state,<sup>827</sup> an appeal with a proper bill of exceptions acts as a supersedeas.<sup>828</sup> This would leave the defendant still the governor, and since the pardoning power may be exercised after the verdict of guilty,—even while the judgment is vacated or suspended pending an appeal,<sup>829</sup> the governor could pardon himself.<sup>830</sup> This would not bar a subsequent impeachment, but it would bar a second prosecution for the crime of which he had been convicted and pardoned. Any statutory provisions, it may be added, under the terms of which a governor could be removed from office by conviction in a criminal court, would be unconstitutional.<sup>831</sup>

### B. Diplomatic Immunity

"The person of a foreign sovereign, going into the territory of another State, is, by general usage and comity of nations, exempt from the ordinary local jurisdiction. Representing the power, dignity, and all the sovereign attributes of his own nation, and going into the territory of another State . . . he is not amenable to the civil or criminal jurisdiction of the country where he temporarily resides."<sup>832</sup> The same protection is accorded the duly accredited diplomatic agent sent by one sovereign to the country of another.<sup>833</sup> This includes not only the ambassador or foreign minister himself, but extends

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825. TENN. CONST. Art. V, § 4. The federal provision is the same although the wording is not identical. U. S. CONST. Art. I, § 3, cl. 7. The state statute repeats the sentence. § 11864.

826. TENN. CONST. Art. 3, § 6; § 11864.

827. § 11763. It was held that the judgment was an automatic termination of office. State *ex rel.* Harvey v. City of Knoxville, 166 Tenn. 530, 64 S. W. 2d 7 (1933). But in this case no appeal was taken.

828. § 11809.

829. State *ex rel.* Barnes v. Garrett, 135 Tenn. 617, 188 S. W. 58 (1916).

830. If the governor could be tried for crime, in the criminal court, while still in office, and this were the only procedure available, the court *might* hold that he could not pardon himself, in order to prevent an otherwise unavoidable absurdity. But since an orderly procedure, entirely free from this difficulty, is available the court will *probably* not add an exception to the pardoning power which is not found in the constitutional clause.

831. Such procedure would be, in effect, an impeachment; and the sole power of impeachment is vested in the House of Representatives. TENN. CONST. Art. V, § 1.

832. WHEATON, INTERNATIONAL LAW 188-89 (2d ed. 1863).

833. United States v. Lafontaine, 26 Fed. Cas. 832, No. 15,550 (C. C. D. C. 1831); VOORHEES, THE LAW OF ARREST 211 (2d ed. 1915). It includes the secretary of a foreign legation. *Ex parte* Cabrera, 4 Fed. Cas. 964, No. 2,278 (C. C. D. Pa. 1805).

also to his family and servants.<sup>834</sup> An *attaché* to a foreign legation is a public minister within this rule, and he holds this immunity, not for himself, but in a representative capacity, and cannot waive it.<sup>835</sup> A foreign *chargé d'affaires* continues his immunity from arrest even after he has been superseded by a minister plenipotentiary until he has had reasonable time to complete his official business and return to his own country.<sup>836</sup>

A foreign consul, being a commercial rather than a diplomatic agent, is not accorded this immunity from arrest<sup>837</sup> unless he is both consul and *chargé d'affaires*, in which case he can claim the protection in the latter capacity.<sup>838</sup> Furthermore, this immunity does not extend to a purported foreign minister from a revolutionary government not recognized by the United States.<sup>839</sup>

The purpose of this diplomatic immunity is not to place certain persons above the law but to avoid international incidents of a very unfortunate nature which might arise from the effort to subject the personal representative of a foreign sovereign to local jurisdiction.<sup>840</sup> The proper procedure in case of an offense by such a representative is to request his recall and to assume he will be duly punished by his own country. The peculiar protection given to the person of the foreign minister does not preclude the use of reasonable force in self-defense against an unlawful assault by such an agent;<sup>841</sup> and should he become an immediate menace to the safety of the community by reason of mental derangement or otherwise, there is no reason to question the privilege of local authorities to take emergency steps to protect life and property pending his recall, even if this should include a "friendly custody" of the minister himself. Taking a foreign minister into custody is not an unlawful arrest if he does not insist upon his immunity;<sup>842</sup> and an officer who stops a

834. "The privilege of a foreign minister extends to his family and servants; and this privilege has been long settled, to extend to the servants who are natives of the country where he resides, as well as to his foreign servants, whom he brings over with him. By the law of nations, a foreign minister cannot give a protection to a person who is not bona fide of his family." *Lockwood v. Coysgarne*, 3 Burr. 1676-77, 97 Eng. Rep. 1041, 1042 (K. B. 1765).

835. *United States v. Benner*, 23 Fed. Cas. 1084, No. 14,568 (C. C. E. D. Pa. 1830).

836. *Dupont v. Pichon*, 4 Dall. 321, 1 L. Ed. 851 (U. S. 1805).

837. See *Coppell v. Hall*, 7 Wall. 542, 543, 19 L. Ed. 244 (U. S. 1868); 7 Ops. ATT'Y GEN. 384 (1855).

838. *Dupont v. Pichon*, 4 Dall. 321, 1 L. Ed. 851 (U. S. 1805).

839. *United States v. Skinner*, 27 Fed. Cas. 1123, No. 16,309 (C. C. D. N. Y. 1818).

840. "... the government of the United States, like that of all civilized nations, is bound to afford redress for the violation of those privileges and immunities which the law of nations confers upon foreign ministers, and which are consecrated by the practice of the civilized world. A neglect, or refusal to perform this duty might lead to retaliation upon our own ministers abroad, and even to war." *United States v. Ortega*, 27 Fed. Cas. 359, 360, No. 15,971 (C. C. E. D. Pa. 1825).

841. *United States v. Liddle*, 26 Fed. Cas. 936, No. 15,598 (C. C. D. Pa. 1808).

842. When civil arrest was recognized procedure a witness was protected from such arrest while attending the case for which he was summoned. It was held, however, that he waived his privilege if he did not insist upon it. See *Tipton v. Harris*, 7 Tenn. 414, 421 (1824); cf. *Grove v. Campbell*, 17 Tenn. 7 (1836). The foreign minister cannot waive his immunity entirely because he holds it in a representative capacity. *United States v. Benner*, 24 Fed. Cas. 1084, No. 14,568 (C. C. E. D. Pa. 1830). But he can

foreign minister to arrest him (without undue force) has not acted unlawfully if he permits the other to proceed on his way as soon as he claims his immunity and identifies himself.

### C. *Congressmen and Legislators*

The following is found in the United States Constitution: "The Senators and Representatives . . . shall in all cases, except Treason, Felony and Breach of the Peace, be privileged from arrest during their attendance at the Session of their respective Houses, and in going to and returning from the same; . . ." <sup>843</sup> A similar protection is secured to members of the General Assembly by the state constitution.<sup>844</sup> The scope of such immunity depends upon whether the phrase "breach of the peace" in this clause is given the narrow meaning of a "public offense done by violence or one causing or likely to cause an immediate disturbance of public order" <sup>845</sup>—or the broad significance of any indictable offense.<sup>846</sup> The Supreme Court of the United States in a well-considered opinion held that the phrase as used in this clause has the broad significance of *public offense* and hence is to be interpreted as if it read "except in cases of treason, felony or misdemeanor"—thereby limiting the immunity to civil cases.<sup>847</sup> This result is reached because this immunity is adapted from the so-called "privilege of Parliament" which was similarly worded and yet clearly recognized as providing exemption from arrest in civil cases only.<sup>848</sup>

The problem has seldom arisen but the same result may be found in cases in Pennsylvania<sup>849</sup> and California.<sup>850</sup> In the latter case a member of the legislature, on his way to a session of that body, violated an ordinance by crossing a street on foot against the traffic controlled by an officer. The California court held that the phrase "breach of the peace" in the state constitution granting legislators immunity from arrest meant *any public offense* and that it was proper for the officer to arrest the legislator when he persisted in crossing in spite of the officer's warning.

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waive it to such an extent that the officer who did not know he was a foreign minister would have no liability because of the arrest.

843. Art. I, § 6, cl. 1.

844. TENN. CONST. Art. II, § 13.

845. RESTATEMENT, TORTS § 116 (1934).

846. The broad meaning grew out of the fact that indictments in the early days concluded with some such phrase as "against the peace of our lord the King." See *Rawlins v. Ellis*, 16 M. & W. 172, 173, 153 Eng. Rep. 1147, 1148, (Ex. 1846).

847. *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278 (1908).

848. See *In re Emmett*, 120 Cal. App. 349, 7 P. 2d 1096, 1098 (1932).

849. *Commonwealth ex rel. Bullard v. Keeper of the Jail*, 13 Phila. 573 (Pa. 1887).

850. *In re Emmett*, 120 Cal. App. 349, 7 P. 2d 1096 (1932).

## D. Electors

The Constitution of Tennessee also exempts electors from arrest during their attendance at elections, and in going to and returning from them, "in all cases, except treason, felony or breach of the peace."<sup>851</sup> There is no reason to expect a different interpretation of the phrase in this clause.<sup>852</sup>

A defendant in a criminal case has no immunity from arrest on another criminal charge except that the court having jurisdiction of the defendant will retain it as long as necessary for the disposal of the original prosecution.<sup>853</sup>

VIII. CONSEQUENCES OF UNLAWFUL ARREST<sup>854</sup>

No arrest is lawful unless made (1) with authority and (2) in a proper manner. Hence an unauthorized arrest is unlawful *regardless* of the manner in which it is made,<sup>855</sup> and an authorized arrest is unlawful *if* made in an illegal manner.<sup>856</sup> An officer, for example, who has taken a person into custody on a misdemeanor charge may have done so unlawfully for various reasons

851. "Electors shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest or summons, during their attendance at elections, and in going to and returning from them." TENN. CONST. ART. IV, § 3; § 1942.

852. The immunity from arrest by parties to suit is sometimes worded in the same way. But it "is confined to parties to civil proceedings, unless it appear that his apprehension on the criminal charge was a contrivance by the plaintiff to get him into custody on the civil suit." *Commonwealth v. Daniel*, 4 Pa. L. J. Rep. 49, 51 (Quar. Sess. 1847). The Tennessee statute with reference to witnesses expressly limits the immunity to civil cases. § 9798. The same is true of the members of the Tennessee National Guard. § 845.15.

There is a growing body of offenses that are coming to be recognized as outside the realm of true crime. These offenses have been placed under various labels: "Public torts"—Notes, *Public Torts*, 35 HARV. L. REV. 462 (1922), *Public Torts and Mens Rea*, 12 IOWA L. REV. 407 (1927); "Public Welfare Offenses"—Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933); "Police Offenses"—Freund, *Classification and Definition of Crimes*, 5 J. OF CRIM. L. AND CRIMINOLOGY 807, 824 (1915). There is a tendency to recognize them as "civil offenses" rather than crimes. Note, *Reclassification of Certain Offenses as Civil Instead of Criminal*, 12 WIS. L. REV. 365 (1937). There is a possibility that these "civil offenses" may be held to fall outside the phrase "breaches of the peace" and hence within the provision granting legislators and electors immunity from arrest. The California case involved a violation of a city traffic ordinance. *In re Emmett*, 120 Cal. App. 349, 7 P. 2d 1096 (1932). But the possibility of the distinction here mentioned was overlooked.

853. One who was returned to stand trial on indictment under the Fugitive Felon Act was not entitled to a writ of protection against state prosecution for the original felony. *United States v. Conley*, 80 F. Supp. 700 (D. Mass. 1948).

854. For a discussion of the practical problems involved see Warner, *Investigating the Law of Arrest*, 26 A. B. A. J. 151 (1940).

855. *McCullough v. Greenfield*, 133 Mich. 463, 95 N. W. 532 (1903).

856. Officers who refused to show their warrant upon request, saying they "did not have to show it," were guilty of an unlawful arrest. *Crosswhite v. Barnes*, 138 Va. 471, 124 S. E. 242 (1924). An arrest for an offense committed in the officer's presence is made in an unlawful manner if the arrestee is in obvious need of immediate medical attention and is locked up for the night without giving him an opportunity to call a doctor and without notifying his family. *State ex rel. Morris v. National Surety Company*, 162 Tenn. 547, 39 S. W. 2d 581 (1931).

"Legality of arrest hinges most frequently upon the discharge of duties after the apprehension of the arrestee." Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. OF CHI. L. REV. 345, 367 (1936). And see Bohlen and Shulman, *Effect of Subsequent Misconduct upon a Lawful Arrest*, 28 COL. L. REV. 841 (1928).

such as,—(1) having arrested him without a warrant for an offense not committed in the officer's presence;<sup>857</sup> or (2) having shot him in flight although he was not endangering the officer or anyone else.<sup>858</sup> The common use of the phrase "unlawful arrest" to indicate either of these different types of misconduct is emphasized because the consequences of the two are not identical.

*Release of arrestee.* One who is being held in custody without lawful authority is entitled to immediate release, and to enforcement of this right by habeas corpus proceedings if necessary.<sup>859</sup> The mere fact of an unlawful arrest, however, will not necessarily produce this result. If the issue is raised at a time when the arrestee is before one having the power of a committing magistrate, and adequate cause for keeping him in custody is then shown, in proper form, the magistrate is authorized to order his commitment (or release on bail if he is entitled thereto) even if the arrest itself was made without authority of law,<sup>860</sup> or in an unlawful manner.<sup>861</sup> If one who should be in cus-

857. *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200 (1893).

858. *Human v. Goodman*, 159 Tenn. 241, 18 S. W. 2d. 381 (1929); *Reneau v. State*, 70 Tenn. 720 (1879); cf. *Hall v. State ex rel. Norman*, 10 Tenn. App. 287 (E. S. 1929).

859. Invalid ordinance, *The Stockton Laundry Case*, 26 Fed. 611 (C. C. D. Cal. 1886); privilege against arrest, *In re Robinson*, 29 Neb. 135, 45 N. W. 267 (1890), but *contra*, *State ex rel. Isenring v. Polacheck*, 101 Wis. 427, 77 N. W. 708 (1898); or illegal confinement in civil proceedings, hospital for inebriates, *Addis v. Applegate*, 171 Iowa 150, 154 N. W. 168 (1915).

860. *State ex rel. Estill v. Endsley*, 122 Tenn. 647, 126 S. W. 103 (1909); *Ex parte Crandall*, 2 Cal. 144 (1852); *Steadman v. State*, 37 So. 2d 357 (Miss. 1948); A. L. I. CODE OF CRIMINAL PROCEDURE 200-1 (Official Draft with Commentaries, 1931).

Irregularities in the warrant under which he was arrested will not entitle a prisoner to release on habeas corpus if it appears at the hearing that he is an extraditable fugitive. *State ex rel. Knowles v. Taylor*, 160 Tenn. 44, 22 S. W. 2d 222 (1929). Even a false arrest does not necessarily deprive a court of jurisdiction. *Albrecht v. United States*, 273 U. S. 1, 47 Sup. Ct. 250, 71 L. Ed. 505 (1927).

"But why is this point made when later a regular warrant was issued, and the party is now under indictment? The court could not turn Sutter loose though the arrest had been unlawful." *State v. Sutter*, 71 W. Va. 371, 373, 76 S. E. 811, 812 (1912). The fact that defendant was arrested under a warrant charging disorderly conduct is no bar to a trial on a charge of vagrancy because the court will not inquire into the manner in which accused was brought before it. *Davenport v. District of Columbia*, 61 A. 2d 486 (D. C. Mun. Ct. App. 1948).

One who has been arrested on a warrant which does not properly designate the offense with which he is charged has been unlawfully arrested since the warrant is neither valid nor "fair on its face." But this does not entitle the prisoner to a release if he is before a magistrate and there is sufficient ground at the time to hold him. *Crichton v. State*, 115 Md. 423, 81 Atl. 36 (1911). The court mentions that the justice could amend the warrant, but this would not seem necessary unless the procedure requires a warrant for the continued custody of one arrested without a warrant,—which is not true in Tennessee. *Hoggatt v. Bigley*, 25 Tenn. 236 (1845). In some jurisdictions a warrant for further detention is required in case of arrest without a warrant. *State v. Keller*, 61 A. 2d 283 (N. J. 1948); *Perry v. Hurdle*, 229 N. C. 216, 49 S. E. 2d 400 (1948). "Even if he was illegally arrested and held, this does not absolve him from punishment when lawfully indicted, tried and convicted." *Meadows v. Warden of Maryland Penitentiary*, 61 A. 2d 561 (Md. 1948).

861. "If a person arrested should ask a court to discharge him on the ground that more force was used than necessary to arrest and detain him, on the ground that he was not informed at the time of the arrest of the authority under which the officer was acting, or that the warrant was not exhibited to him on demand, no court would discharge him, if it appeared that the arrest was made under a valid warrant delivered to an officer authorized to execute it, who in person or by deputy had made the arrest." *Cabell v. Arnold*, 86 Tex. 102, 108, 23 S. W. 645, 647 (1893). On the same principle, evidence

tody was arrested unlawfully the officer is liable in damages but the arrestee will not be released.<sup>862</sup> Under other circumstances the officer may have no liability although the arrestee is entitled to be released at once.<sup>863</sup>

### A. Damages in a Civil Action

Although very few suits are brought against police or other officers,<sup>864</sup> one who has been taken into custody unlawfully is entitled to recover damages in a civil action against his arrester whether the illegality was due to lack of authority<sup>865</sup> or to the improper exercise of authority.<sup>866</sup> If the action is not against the arrester, however, but against the sureties on an official bond, the Tennessee court has held (apparently overlooking one statute in regard to the first point)<sup>867</sup> that the sureties are not liable if the arrest was without authority of law,<sup>868</sup> although they are liable if an authorized arrest was made in an

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obtained by the execution of a valid search warrant will not be excluded by reason of some impropriety in the method of execution. *Collins v. State*, 184 Tenn. 356, 199 S. W. 2d 96 (1947).

862. See *State ex rel. Estill v. Endsley*, 122 Tenn. 647, 126 S. W. 103 (1909); *Ex parte Crandall*, 2 Cal. 144 (1852).

863. For example, if the name used in the warrant applies to two persons (either exactly or under the rule of *idem sonans*) and the officer brings in the one *not* intended, the arrestee is entitled to be released as soon as this fact is established but the officer has no liability if he reasonably believed the arrestee was the one intended. *O'Neill v. Keeling*, 227 Iowa 754, 288 N. W. 887 (1939); *Drake v. Keeling*, 287 N. W. 596 (Iowa 1939). One who has been arrested under a void ordinance is entitled to be released on habeas corpus, but if the arrest was under a warrant that was fair on its face the apprehending officer is not liable in damages. *Hoischulte v. Doe*, 78 Fed. 436 (C. C. N. D. Cal. 1897).

864. Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. OF CHI. L. REV. 345, 346 (1936).

865. *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200 (1893); *Pesterfield v. Vickers*, 43 Tenn. 205 (1866); *McQueen v. Heck*, 41 Tenn. 212 (1860).

866. *State ex rel. Morris v. National Surety Company*, 162 Tenn. 547, 39 S. W. 2d 581 (1931); *Human v. Goodman*, 159 Tenn. 241, 18 S. W. 2d 381 (1929); *Love v. Bass*, 145 Tenn. 522, 238 S. W. 94 (1921).

867. "Every official bond executed under this Code is obligatory on the principal and sureties thereon— . . . (3) For the use and benefit of every person who is injured, as well as by any wrongful act committed under color of his office as by the failure to perform, or the improper or neglectful performance, of the duties imposed by law." § 1833. This statute says in effect that the principal and sureties on an official bond are liable for wrongful acts of the principal, whether done *colore officii* or *virtute officii*. This was § 959 of the Code of 1884 and § 771 of the Code of 1858. Another section deals with the sheriff's bond, as such. "The sheriff, before entering on the duties of his office, shall give bond, with good security, in a penalty of not less than twelve nor more than fifty thousand dollars, at the discretion of the court, payable to the state, and conditioned well and truly to execute and due return make of all process to him directed, and to pay all fees and sums of money by him received or levied by virtue of any process into the proper officer, or to the person entitled, and faithfully to execute the office of sheriff, and perform its duties and functions during his continuance therein." § 690. This was § 443 of Shannon's Code and was mentioned in *Ivy v. Osborne*, 152 Tenn. 470, 474, 270 S. W. 384, 385 (1925). It was held that under this section the sheriff's "bondsmen are only answerable for the faithful performance of official duty." *Ibid.* This section requires the bond to be given. § 1833 says: "Every official bond executed under this Code is obligatory on the principal and sureties thereon" as therein set forth (italics added). It is unfortunate that § 1833 was not called to the attention of the court in these cases.

868. *Stephen v. Hinds*, 183 Tenn. 652, 194 S. W. 2d 483 (1946); *Ivy v. Osborne*, 152 Tenn. 470, 279 S. W. 384 (1925); *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200 (1893); *Hall v. State ex rel. Norman*, 10 Tenn. App. 287 (E. S. 1929). The distinction

illegal manner,<sup>869</sup>—except that a policeman's bond has been held to be for the protection of the city only, and not available to an individual injured by the officer.<sup>870</sup> Although a sheriff would be liable for an authorized arrest made by his deputy in an unlawful manner, he is not liable for an unauthorized arrest made by his deputy unless he himself authorized it, or by his course of conduct approved of it.<sup>871</sup>

The basis of illegality may have an important bearing upon the result even in an action against the arrester himself. This is in regard to the amount of the recovery. Damages assessed against an officer usually will be small if it is a case in which he has made an arrest in good faith but without authority of law, in a manner not causing harm or serious inconvenience.<sup>872</sup> They may be quite large if the arrest was made in an unlawful manner, par-

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between acts by an officer of the law done without authority of law and those done in an illegal manner has been explained as follows: "The authorities recognize a principle or rule by which the acts of the sheriff, for which his sureties may be held liable, can be distinguished from those acts for which they will not be held liable. The former are termed acts done *virtute officii*, and the latter *colore officii*. The distinction is this: Acts done *virtute officii* are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii*, are where they are of such a nature, that his office gives him no authority to do them." *People ex rel. Kellogg v. Schuyler*, 4 N. Y. 173, 187 (1850). Contrary to the Tennessee position, some jurisdictions do not make the above distinction and hold the surety liable even if the officer's act was without authority of law. "If, in exercising the functions of his office, defendant [the surety] is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs." *Clancy v. Kenworthy*, 74 Iowa 740, 743, 35 N. W. 427, 428 (1887). The Tennessee court has held that an act done corruptly under color of office, although beyond the authority of the officer is "official misconduct." *Wells v. State*, 174 Tenn. 552, 129 S. W. 2d 203 (1939).

869. *State ex rel. Morris v. National Surety Co.*, 162 Tenn. 547, 39 S. W. 2d 581 (1931); *Love v. Bass*, 145 Tenn. 522, 238 S. W. 94 (1921).

870. A misdemeanor who was unlawfully shot by a policeman could not recover on the officer's bond, since the bond was not given under § 1833. *Carr v. Knoxville*, 144 Tenn. 483, 234 S. W. 328 (1921). The court emphasized that the bond in this case was one required by city ordinance but not by the Code. *Id.* at 489, 234 S. W. at 330.

871. *Ivy v. Osborne*, 152 Tenn. 470, 279 S. W. 384 (1925); *Stephens v. Hinds*, 183 Tenn. 652, 194 S. W. 2d 483 (1946).

872. A sheriff, misunderstanding his authority, rearrested a man a second time on an original *capias*. The judgment against him was for \$86.25. *McQueen v. Heck*, 41 Tenn. 212 (1860).

Special circumstances may make a difference. For example, a man over 85 years of age recovered \$1,000 general damages, \$500 punitive damages, and \$35 special damages against two police officers who arrested him without authority. *Bratt v. Smith*, 197 P. 2d 681 (Ore. 1948). The nature of the charge also may be important. Two respectable women "stupidly and quite unlawfully arrested by the police on a charge of soliciting for prostitution, were given verdicts of \$300 each by the jury, though they had been discharged from custody as soon as brought to the station." Waite, *The Law of Arrest*, 24 TEX. L. REV. 279, 283 (1946).

An officer who makes an arrest without authority is liable for this wrongful act, but damages to be recovered by the arrestee cannot include any item for detention after he was lawfully in custody. Thus, if the arrest was under a warrant and was made by an officer who did not have the warrant, the detention ceased to be unlawful after the arrestee was delivered to the officer holding the warrant. *McCullough v. Greenfield*, 133 Mich. 463, 95 N. W. 532 (1903). And if an arrest is unlawful because it was without a warrant and one was necessary under the circumstances, the detention ceases to be unlawful after a complaint is filed and a warrant duly issued. *Harris v. McReynolds*, 10 Colo. App. 532, 51 Pac. 1016 (1898).



ticularly if serious harm has resulted from the unprivileged use of deadly force.<sup>873</sup> An unauthorized arrest resulting in a long period of incarceration may also be deemed to justify substantial damages.<sup>874</sup>

A private person who merely reports the facts to an officer, leaving the latter to act upon his own judgment one way or the other, is not liable if the officer makes an unauthorized arrest;<sup>875</sup> but one who directs an officer to take another into custody is liable to the arrestee if this is done without authority,<sup>876</sup> and the damages in such cases are sometimes large particularly if the defendant is a corporation.<sup>877</sup> The action to recover damages for unlawful arrest is usually either assault,<sup>878</sup> battery,<sup>879</sup> false imprisonment,<sup>880</sup>

873. *Beardsley v. Soper*, 184 App. Div. 399, 171 N. Y. Supp. 1043 (3d Dep't 1918). And see *Frazier v. Parsons*, 24 La. Ann. 339 (1872). A judgment for \$2,000 was recovered against a deputy sheriff who shot a fleeing person in the leg while attempting to make an unauthorized arrest for a misdemeanor. *Hall v. State ex rel. Norman*, 10 Tenn. App. 287 (E. S. 1929). A judgment for \$44,500 was entered against officers who shot and put out the eye of one person while trying to execute a void warrant naming another. In this case the judgment was reversed for reasons having nothing to do with its size. *Reichman v. Harris*, 252 Fed. 371 (6th Cir. 1918).

874. One who was arrested for a misdemeanor not committed in the presence of the officers and kept in custody recovered \$350 from the apprehending officers and \$400 from them and the chief who ordered the arrest. *Karney v. Boyd*, 186 Wis. 594, 203 N. W. 371 (1925). One who was unlawfully locked up for eight days without being taken before a magistrate after an authorized arrest recovered \$325. *Green v. Kennedy*, 46 Barb. 16 (N. Y. 1866); cf. *Brock v. Stinson*, 108 Mass. 520 (1871).

875. *Hertzka v. Ellison*, 8 Tenn. App. 667 (M. S. 1928); *Rush v. Buckley*, 100 Me. 322, 61 Atl. 774 (1905); *Snider v. Wimberly*, 357 Mo. 491, 209 S. W. 2d 239 (1948). And see *Stueber v. Admiral Corporation*, 171 F. 2d 777 (7th Cir. 1949).

876. *West v. Tylor*, 42 Tenn. 96 (1865); *Pilos v. First National Stores*, 319 Mass. 475, 66 N. E. 2d 576 (1946). And see *Hertzka v. Ellison*, 8 Tenn. App. 667 (M. S. 1928); cf. *Terry v. Burford*, 131 Tenn. 451, 175 S. W. 538 (1914). A chief of police is liable to one unlawfully arrested or committed by his order. *Green v. Kennedy*, 46 Barb. 16 (N. Y. 1866); *Karney v. Boyd*, 186 Wis. 594, 203 N. W. 371 (1925); cf. *Shepherd v. Staten*, 52 Tenn. 79 (1871).

877. A private detective, employed by a railroad company to pursue an embezzler into another state, bunglingly arrested a stranger by mistake, persuaded him to return without extradition proceedings and carried him back in irons. A verdict of \$5,000 against the company was permitted to stand. A release which he had signed was held to be void for duress. *Harris v. Louisville, N. O. & T. R. R.*, 35 Fed. 116 (C. C. W. D. Tenn. 1888).

A clerk delayed a customer on the pretext of making change, thinking a half dollar tendered by the customer was counterfeit. An officer was called who took her to the police station and then to the post office. A judgment for \$1,500 against the company was affirmed. *S. H. Kress & Co. v. Bradshaw*, 186 Okla. 588, 99 P. 2d 508 (1940). A train caller said to an officer: "Stop that woman." A policeman arrested her. A judgment for \$2,500 was reversed for reasons having nothing to do with the amount. *Harris v. Terminal R. Ass'n*, 203 Mo. App. 324, 218 S. W. 686 (1920). Employees of Montgomery Ward and Company saw a customer take a small tool from a counter and put it in his pocket. It was worth about 75 cents. At the request of the employees an officer, who was not present at the time, arrested the customer. A judgment in the sum of \$750 against the company was reversed because of improper instructions,—but the court held the arrest was unlawful and found no fault with the amount of the judgment. *Montgomery Ward & Co. v. Wickline*, 50 S. E. 2d 387 (Va. 1948).

If a person employed by a private corporation to protect its property is duly commissioned a deputy sheriff, with general authority to act as such, his employer will not be liable for the act of this deputy which was within the scope of his duty to the public generally. *Du Pont Rayon Co. v. Henson*, 162 Tenn. 394, 36 S. W. 2d 879 (1931). A judgment against the company for \$10,000 was reversed. The arrest was on a public highway running through company property, and was for driving a car with one headlight and no tail light. It was not at the request of the company.

878. *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757 (1903); see *Napper v. State*,

abuse of process,<sup>881</sup> false arrest,<sup>882</sup> suit on the officer's bond,<sup>883</sup> or some combination thereof.<sup>884</sup>

One who maliciously causes the arrest of another is liable for malicious prosecution<sup>885</sup> although the actual apprehension is by an officer who makes the arrest lawfully;<sup>886</sup> but there is no liability on the part of one who swears out a warrant in good faith and upon reasonable grounds, merely because he happened to be mistaken as to the actual facts.<sup>887</sup> One who makes a false accusation for the purpose of inducing an officer to make an arrest may be guilty of slander.<sup>888</sup>

### B. Criminal Prosecution

An unlawful arrest may result in a criminal prosecution of the arrester but this step should be reserved for the extreme cases. If the arrestee (or a bystander) has been killed by the unprivileged use of deadly force in making an arrest the homicide is not less than manslaughter,<sup>889</sup> and may constitute murder if the excessive violence was malicious.<sup>890</sup> Even where the use of deadly force is privileged in making an arrest there is a duty to use reasonable care not to endanger innocent bystanders; and the death of such a person resulting from a shot fired in extreme disregard of obvious and unreasonable

200 Ga. 626, 629, 38 S. E. 2d 269, 271 (1946); *People ex rel. Gow v. Bingham*, 57 Misc. 66, 75, 107 N. Y. Supp. 1011, 1018 (Sup. Ct. 1907).

879. *Johnson v. Mack*, 141 Mich. 99, 104 N. W. 395 (1905).

880. *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200 (1893); *Hertzka v. Ellison*, 8 Tenn. App. 667 (M. S. 1928); *Reichman v. Harris*, 252 Fed. 371 (6th Cir. 1918); *Kratzer v. Matthews*, 233 Mich. 452, 206 N. W. 982 (1926); *Hays v. Creary*, 60 Tex. 445 (1883).

881. *McGann v. Allen*, 105 Conn. 177, 134 Atl. 810 (1926).

882. *Snyder v. Wimberly*, 357 Mo. 491, 209 S. W. 2d 239 (1948); *Rhodes v. Collins*, 198 N. C. 23, 150 S. E. 492 (1929). And see *Hepworth v. Covey Bros. Amusement Co.*, 97 Utah 205, 91 P. 2d 507 (1939).

883. *State ex rel. Morris v. National Surety Co.*, 162 Tenn. 547, 39 S. W. 2d 581 (1931); *Ivy v. Osborne*, 152 Tenn. 470, 279 S. W. 384 (1925); *Love v. Bass*, 145 Tenn. 522, 238 S. W. 94 (1921).

884. Assault and battery and false imprisonment, *Pesterfield v. Vicars*, 43 Tenn. 205 (1866). Malicious arrest and false imprisonment, *McQueen v. Heck*, 41 Tenn. 212 (1860). Assault and battery and illegal arrest, *Crosswhite v. Barnes*, 139 Va. 471, 124 S. E. 242 (1924).

885. *West v. Tylor*, 42 Tenn. 96 (1865).

886. See *Herzog and Uhlman v. Graham*, 77 Tenn. 152, 154 (1882). The court held that if the arrest was by a policeman, acting under a valid warrant, he and those assisting him would be protected. It added that those who procured the issuance of the warrant are liable to an action for malicious prosecution if they acted maliciously and without probable cause.

887. *Perry v. Hurdle*, 229 N. C. 216, 49 S. E. 2d 400 (1948).

888. *Pilos v. First National Stores*, 319 Mass. 475, 66 N. E. 2d 576 (1946).

889. *Scarborough v. State*, 168 Tenn. 106, 76 S. W. 2d 106 (1934); *Reneau v. State*, 70 Tenn. 720 (1879); *Carter v. State*, 30 Tex. Cr. 551, 17 S. W. 1102 (1891).

890. *State v. Coleman*, 186 Mo. 151, 84 S. W. 978 (1905); see *Reneau v. State*, 70 Tenn. 720, 721 (1879). The killing of an innocent bystander is murder if it results from a shot fired at a fleeing misdemeanant under such circumstances that it would have been murder if the one shot at had been killed. *State v. O'Neil*, *Houst. Cr.* 468 (Del. 1875).

danger to him would be manslaughter on the basis of a criminally negligent homicide.<sup>891</sup>

Shooting at an arrestee when there is no privilege to use this type of force constitutes an assault if the shot misses its intended mark.<sup>892</sup> Even non-deadly force in the making of an authorized arrest may be so obviously and unreasonably excessive as to constitute a criminal battery.<sup>893</sup> The use of any force in making an unauthorized arrest is without legal privilege. Hence in making such an arrest any touching is a technical battery,<sup>894</sup> any attempt to offer to touch is a technical assault,<sup>895</sup> and any confinement is a technical false imprisonment.<sup>896</sup> Any of these is sufficient for nominal damages in a civil action, but will not support a criminal prosecution unless the circumstances are sufficiently extreme to establish *mens rea* on the part of the arrestee.<sup>897</sup>

To add an extreme and unusual situation, officers may be guilty of robbery for seizing money of an arrestee with intent to appropriate it to their

891. An officer who is privileged to shoot if necessary to stop a fleeing robber may be civilly liable if he negligently kills an innocent bystander. *Askay v. Maloney*, 85 Ore. 333, 166 Pac. 29 (1917); see also *Shaw v. Lord*, 41 Okla. 347, 137 Pac. 885 (1914). "Thus, if an actor is privileged to shoot at an escaping felon, he is not liable to a third person harmed by a stray bullet, if when he shot there was little or no probability that any person other than the felon would be hit. But when he shoots into a crowded thoroughfare, and unintentionally hits a passerby, his act is unprivileged if, in view of the surrounding conditions, including the nature of the crime for which he seeks to arrest, recapture or maintain custody, the harm which may ensue if he does not act, and his skill or lack of skill in the use of the weapon, it is unreasonable for him to take the chance of causing great harm to bystanders." RESTATEMENT, TORTS § 137, comment c (1934).

892. *Johnson v. State*, 173 Tenn. 134, 114 S. W. 2d 819 (1938).

893. *Moody v. State*, 120 Ga. 868, 48 S. E. 340 (1904).

894. "The law is so jealous of the sanctity of the person that the slightest touching of another, or of his clothes, or cane, or anything else attached to his person, if done in a rude, insolent, or angry manner, constitutes a battery for which the law affords redress. . . . An officer, therefore, who would justify laying hands on a person for the purpose of making an arrest, must come protected by the shield provided by law." *Crosswhite v. Barnes*, 139 Va. 471, 124 S. E. 242, 244 (1924).

895. See *Eanes v. State*, 25 Tenn. 53, 54-55 (1845).

896. *Floyd v. State*, 12 Ark. 43 (1851); *Roberts v. Commonwealth*, 284 Ky. 365, 144 S. W. 2d 811 (1940).

897. Blackstone says they are "indictable and punishable with fines and imprisonment, or with other ignominious corporal penalties, where they are committed with any very atrocious design. . . ." 4 BL. COMM. \*217. This is said of assaults and batteries and in speaking of false imprisonment he refers back to his comments on these offenses. *Id.* at \*218. The reference to an "atrocious design" involves more than would be required for such offenses today, but an intentional violation of the law or conduct sufficiently extreme to be designated as "criminal negligence" in this regard would be required to establish the *mens rea*.

The Tennessee court said *obiter*: "We have no statute penalizing officers for unlawful arrest or unlawful search of unoffending persons." *Tenpenny v. State*, 151 Tenn. 669, 672, 270 S. W. 989 (1924). This does not mean that the officer cannot be criminally responsible for harm resulting from unlawful arrest in extreme cases, as shown by *Johnson v. State*, 173 Tenn. 134, 114 S. W. 2d 819 (1938); *Scarborough v. State*, 168 Tenn. 106, 76 S. W. 2d 106 (1934); *Reneau v. State*, 70 Tenn. 720 (1879). It means that in the absence of substantial harm resulting therefrom, the mere technicality of an unauthorized arrest will not support a criminal proceeding.

own use, though they would have been privileged to take it for the purpose of safe-keeping for the arrestee.<sup>898</sup>

### C. Proceedings under Federal Law

Proceedings against state officers under federal law, based upon unlawful arrest, are either tort actions or criminal prosecutions but are given separate attention here for emphasis. One important federal statute reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."<sup>899</sup> This is commonly referred to as the "civil rights act."<sup>900</sup> A complaint alleging that defendants had deprived the plaintiffs of their liberty without due process of law under color of extradition proceedings, stated a valid cause of action under this act.<sup>901</sup> And the use of third degree practices by state or local officers gives rise to an original right of action in a federal district court for injunction and damages under its provisions.<sup>902</sup>

A corresponding provision makes it a federal crime *wilfully* to deprive a person of constitutional rights under color of state law.<sup>903</sup> Due process of law, secured to the individual by the Fourteenth Amendment, requires that "state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"<sup>904</sup> The act of a state officer performed under the cloak of authority given him by the state, but beyond his authority and in violation of law, is not merely the unauthorized act of a private person;<sup>905</sup> it is state

898. *Tones v. State*, 48 Tex. Cr. 363, 88 S. W. 217 (1905).

899. REV. STAT. § 1979 (1875), 8 U. S. C. § 43 (1946). The federal district courts have jurisdiction over suits brought under this section without allegation or proof of any jurisdictional amount. *Douglas v. City of Jeannette*, 319 U. S. 157, 63 Sup. Ct. 877, 87 L. Ed. 1324 (1943).

900. For an extensive review of the Civil Rights Act, see Note, 43 ILL. L. REV. 105 (1948).

901. *Picking v. Pennsylvania R. R.*, 151 F. 2d 240 (3d Cir. 1945).

902. *Refoule v. Ellis*, 74 F. Supp. 336 (N. D. Ga. 1947). After state officers had taken Refoule into custody on four different occasions and subjected him to long periods of questioning without benefit of counsel (and had perhaps subjected him to more severe treatment) the federal court issued an injunction restraining them from exercising further restraint over him without a warrant or lawful arrest, and from further questioning without his consent after being afforded an opportunity of consulting with counsel.

903. "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, . . . shall be fined not more than \$1,000 or imprisoned not more than one year or both." 18 U. S. C. § 242 (1948).

904. *Hebert v. Louisiana*, 272 U. S. 312, 316, 47 Sup. Ct. 103, 71 L. Ed. 270 (1926).

905. *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676 (1879).

action within the meaning of the Amendment, but the officer may be individually liable.<sup>906</sup> The "due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion."<sup>907</sup> And long confinement incommunicado with persistent questioning has been held a denial of due process.<sup>908</sup> Hence a coerced confession in *wilful* violation of law, by officers and under color of law, transgresses the United States Criminal Code.<sup>909</sup>

#### D. Exclusion of Evidence

A coerced confession is inadmissible in evidence both because it is untrustworthy<sup>910</sup> and because it results from a deprivation of due process of law guaranteed to the defendant by the Fourteenth Amendment.<sup>911</sup> Other incriminating evidence obtained by officers as a result of unlawful arrest, or unlawful search and seizure, is not untrustworthy but results from the deprivation of a constitutional right. Jurisdictions differ as to the admissibility of such evidence.<sup>912</sup> One view is that since it is relevant and trustworthy it should be usable at the trial the same as other evidence, and that the effort to control such misconduct should be left entirely to other remedies.<sup>913</sup> The other view, that the defendant is entitled to ask the court to suppress evidence obtained by such unlawful conduct on the part of its own officers, prevails in the federal cases<sup>914</sup> and in a number of states<sup>915</sup> including Tennessee.<sup>916</sup> On the other hand, evidence obtained by state officers, as a result

906. *Screws v. United States*, 325 U. S. 91, 65 Sup. Ct. 1031, 89 L. Ed. 1495 (1945).

907. *Adamson v. California*, 332 U. S. 46, 54, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947).

908. *Haley v. Ohio*, 332 U. S. 596, 68 Sup. Ct. 302, 92 L. Ed. 239 (1948); *Malinski v. New York*, 324 U. S. 401, 65 Sup. Ct. 781, 89 L. Ed. 1029 (1945). The first involved all-night questioning of a 15-year-old boy, and the second a two-day period in a hotel room.

909. *Screws v. United States*, 325 U. S. 91, 65 Sup. Ct. 1031, 89 L. Ed. 1495 (1945). "[I]t is plain that basic to the concept of due process of law in a criminal case is a trial—a trial in a court of law, not 'trial by ordeal.'" *Id.* at 106. In this case a young Negro, arrested on a charge of stealing a tire, was beaten to death by a sheriff.

910. "A person not of strong character, overawed and subdued by a criminal charge, . . . may, under *influence*, confess himself guilty, when in fact he is innocent." *Deathridge v. State*, 33 Tenn. 75, 79 (1853).

911. *Ashcraft v. Tennessee*, 322 U. S. 143, 64 Sup. Ct. 921, 88 L. Ed. 1192 (1944); *Chambers v. Florida*, 309 U. S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940).

912. 8 WIGMORE, EVIDENCE §§ 2183, 2184a (3d ed. 1940).

913. This is Wigmore's view. *Ibid. Accord, Ex parte City of Mobile*, 38 So. 2d 330 (Ala. 1949).

914. *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914); *United States v. Asendio*, 171 F. 2d 122 (3d Cir. 1948).

915. *People v. Mirbelle*, 276 Ill. App. 533 (1934); *People v. Stein*, 265 Mich. 610, 251 N. W. 788 (1933); *State v. Jones*, 214 S. W. 2d 705 (Mo. 1948).

916. *Epps v. State*, 185 Tenn. 226, 205 S. W. 2d 4 (1947); *Robertson v. State*, 184 Tenn. 277, 198 S. W. 2d 633 (1947); *Cox v. State*, 181 Tenn. 344, 181 S. W. 2d 338 (1944); *Hughes v. State*, 176 Tenn. 330, 141 S. W. 2d 477 (1940); *Elliott v. State*, 173 Tenn. 203, 116 S. W. 2d 1009 (1938); *Lucarini v. State*, 159 Tenn. 373, 19 S. W. 2d 239 (1929); *Hampton v. State*, 148 Tenn. 155, 252 S. W. 1007 (1923); *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588 (1921). It was held at one time that "unauthorized acts" of petty officers did not bar the admission of evidence of crime discovered thereby. *Cohn v. State*, 120 Tenn. 61, 109 S. W. 1149 (1907). This was not in line with the Tennessee rule and was subsequently overruled. *Lucarini v. State*, 159 Tenn. 373, 19 S. W. 2d 239 (1929); *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588 (1921).

of an unlawful search, is admissible in a federal prosecution if the state officers were acting solely on their own account in making the search.<sup>917</sup> And evidence obtained by federal officers is admissible in a state court, even if a state law was violated, if they were acting solely under the authority of the federal government,—but not if a state officer was present to give aid if necessary.<sup>918</sup> Officers of another jurisdiction are regarded as private persons for this purpose, and evidence obtained as a result of an unauthorized search by a private person is admissible.<sup>919</sup>

Under the Tennessee rule the defendant may have evidence which was obtained by unlawful search and seizure by state or local officers excluded even if his first objection to its use is made when it is offered at the trial.<sup>920</sup> The correct procedure in such a case is for the court to institute a preliminary inquiry to determine the issue of admissibility.<sup>921</sup>

*Confession while in custody.* A confession is not inadmissible merely because it was obtained from one who was in custody at the time,<sup>922</sup> but there has been some misunderstanding as to the admissibility of a confession made to officers by one in custody who had not yet been taken before a magistrate for a hearing. Even such a confession is clearly admissible if made freely, voluntarily and promptly.<sup>923</sup> The question is this: Does the fact that officers delayed taking the arrestee before a magistrate for the purpose of obtaining a confession, or of securing other evidence of guilt, bar the admission of a confession obtained during this delay? The answer of the Federal Court is yes,—the confession is inadmissible.<sup>924</sup> The tendency of the state courts is to hold such a confession admissible if voluntarily given.<sup>925</sup> The difference in

917. *United States v. Jordan*, 79 F. Supp. 411 (E. D. Pa. 1948); *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914); *Youngblood v. United States*, 266 Fed. 795 (8th Cir. 1920).

918. *Johnson v. State*, 155 Tenn. 628, 299 S. W. 800 (1927).

919. *State v. Steely*, 327 Mo. 16, 33 S. W. 2d 938 (1930).

920. *State v. Bass*, 153 Tenn. 162, 281 S. W. 936 (1926).

921. *Tenpenny v. State*, 151 Tenn. 669, 270 S. W. 989 (1924); *Goodwin v. State*, 148 Tenn. 682, 257 S. W. 79 (1924).

922. *United States v. Mitchell*, 322 U. S. 65, 64 Sup. Ct. 896, 88 L. Ed. 1140 (1944); *Commonwealth v. Mayhew*, 297 Ky. 172, 178 S. W. 2d 928 (1944).

923. *Ibid.* In the *Mitchell* case the defendant was unlawfully detained in custody for days before being taken before the commissioner, but his confession was volunteered before there had been time for a hearing; hence the confession was obtained before the detention became unlawful.

924. *McNabb v. United States*, 318 U. S. 332, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943). The *McNabb* case was thought by some to mean only that a confession obtained by psychological coercion is inadmissible. See *Upshaw v. United States*, 168 F. 2d 167, 169 (D. C. Cir. 1948). This was not the theory of the Supreme Court. It means that a confession obtained *while* the defendant was being detained *unlawfully* is inadmissible. *Upshaw v. United States*, 69 Sup. Ct. 170 (U. S. 1948), 2 VAND. L. REV. 472 (1949).

925. *Wynn v. State*, 181 Tenn. 325, 181 S. W. 2d 332 (1944); *State v. Browning*, 206 Ark. 791, 178 S. W. 2d 77 (1944); *People v. Zammora*, 66 Cal. App. 2d 166, 152 P. 2d 180 (1944); *Finley v. State*, 153 Fla. 394, 14 So. 2d 844 (1943); *Russell v. State*, 196 Ga. 275, 26 S. E. 2d 528 (1943); *State v. Smith*, 158 Kan. 645, 149 P. 2d 600 (1944); *State v. Ellis*, 354 Mo. 998, 193 S. W. 2d 31 (1946); *State v. Nagel*, 28 N. W. 2d 665 (N. D. 1947); *Fry v. State*, 78 Okla. Cr. 299, 147 P. 2d 803 (1944); *Commonwealth v. Wentzel*, 360 Pa. 137, 61 A. 2d 309 (1948). See, generally, 2 VAND. L. REV. 472 (1949).

result between the state and federal cases may be attributed in part to the law of evidence and in part to the law of arrest. Some courts do not exclude a confession merely because it was given during unlawful detention.<sup>926</sup> They scrutinize the facts in such a case to see if any doubt is cast upon the free and voluntary character of the statement,<sup>927</sup> but throw little light upon the law of arrest in these cases since it is immaterial to the point involved. On the other hand, there is no valid objection to the admission of a voluntary confession made during lawful detention.<sup>928</sup> The Tennessee law permits the apprehending officer to delay taking the arrestee before a magistrate in order to obtain more evidence in the case, if the delay is not unreasonable in length,<sup>929</sup> and a voluntary confession made during this period is admissible because obtained during lawful detention.<sup>930</sup>

*Impairment of evidence.* A physical assault by an officer upon a prisoner in his custody, unless in self-defense or to prevent the escape of one charged with felony, will not render the testimony of that officer at the trial of such prisoner inadmissible, but will cause it to be denied favorable consideration.<sup>931</sup> The same is true of the testimony of an officer who was present without protest when such an assault was made.<sup>932</sup>

### E. Other Consequences

*Reversal of conviction.* Unlawfulness of an arrest does not invalidate a conviction of the arrestee resulting from a trial which itself is free from error;<sup>933</sup> but a conviction resulting from the erroneous admission of evidence obtained by officers as a result of unlawful search and seizure, or coercion, will be reversed.<sup>934</sup>

926. *People v. Devine*, 46 Cal. 46 (1873); *State v. Zukauskas*, 132 Conn. 450, 4<sup>th</sup> 2d 289 (1945); *Brown v. State*, 3 Ga. App. 479, 60 S. E. 216 (1908); *Barber v. State*, 62 A. 2d 616 (Md. 1948); *Courtney v. State*, 187 Md. 1, 48 A. 2d 430 (1946); *State v. Higdon*, 356 Mo. 1058, 204 S. W. 2d 754 (1947); *Gilmore v. State*, 3 Okla. Cr. 434, 106 Pac. 801 (1910); *State v. Brown*, 47 S. E. 2d 521 (S. C. 1948).

927. *People v. Klyczek*, 307 Ill. 150, 138 N. E. 275 (1923); *State v. Ellis*, 354 Mo. 998, 193 S. W. 2d 31 (1946); *State v. Nagel*, 28 N. W. 2d 665 (N. D. 1947).

928. Under the Kentucky statute a confession is inadmissible if obtained by an officer "by plying him with questions." KY. REV. STAT. ANN. § 422.110 (Baldwin, 1943). This is an extreme position which places officers at an unreasonable disadvantage.

929. See *Wynn v. State*, 181 Tenn. 325, 330, 181 S. W. 2d 332, 334 (1944).

930. The holding in the *McNabb* case "was rested primarily on Federal statutes which differ materially in this regard from our State statutes." *Ford v. State*, 184 Tenn. 443, 457-58, 201 S. W. 2d 539, 545 (1945). "... this Court has called attention to the distinction based upon our state statutes, and definitely held that the rule announced in the *McNabb* case is without application in this state." *McGhee v. State*, 183 Tenn. 20, 76, 189 S. W. 2d 826, 828 (1945). It is to be noted that the court rests the distinction on the difference between the state and federal statutes on arrest, and not on a difference of policy in dealing with confessions obtained during illegal detention.

931. *Churn v. State*, 184 Tenn. 646, 202 S. W. 2d 345 (1947).

932. *Ibid.*

933. *People v. Miller*, 235 Mich. 340, 209 N. W. 81 (1926).

934. *Epps v. State*, 185 Tenn. 226, 205 S. W. 2d 4 (1947); *Robertson v. State*, 181 Tenn. 277, 198 S. W. 2d 633 (1947); *Smith v. State*, 182 Tenn. 158, 184 S. W. 2d 300 (1945); *Cox v. State*, 181 Tenn. 344, 181 S. W. 2d 338 (1944); *Smith v. State*, 180

*Restoration of property.* If officers have taken anything by an unlawful seizure, the person from whom it was taken is entitled to an order requiring that it be restored to him,<sup>935</sup> unless the very possession of the thing would be unlawful.<sup>936</sup> In such a case no restoration should be directed because the court should not assist in making him a criminal.<sup>937</sup>

*Nonrelease of sureties.* A valid arrest by an officer, of one who has been released on bail, will discharge his sureties,<sup>938</sup> but an unauthorized arrest will not have this effect.<sup>939</sup> Hence if one who was arrested and released on bail is subsequently rearrested by an officer,<sup>940</sup> from whom he escapes, the question whether the sureties on his bond have been released or remain liable is dependent upon the validity or invalidity of this arrest.<sup>941</sup>

Tenn. 633, 90 S. W. 2d 523 (1936); Harlow v. State, 159 Tenn. 537, 20 S. W. 2d 1045 (1929); Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914); United States v. Asendio, 171 F. 2d 122 (3d Cir. 1948); Cowan v. Commonwealth, 308 Ky. 842, 215 S. W. 2d 989 (1948); State v. Jones, 214 S. W. 2d 705 (Mo. 1948).

Mrs. Ashcraft was murdered in Tennessee. Ten days later Ashcraft was arrested and taken to a hotel room where he was held without rest or sleep for 36 hours. Officers took turns subjecting him to a constant barrage of questions during that time. For 28 hours Ashcraft steadily maintained his innocence. At the end of that time he is said to have confessed that he employed Ware to murder Mrs. Ashcraft. He was tried in the state court and convicted largely on the strength of a written confession—although he refused to sign it. This conviction was affirmed by the Supreme Court of Tennessee. But it was reversed by the Supreme Court of the United States on the ground that the admission of this confession, so obtained, deprived him of due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. Ashcraft v. Tennessee, 322 U. S. 143, 64 Sup. Ct. 921, 88 L. Ed. 1192 (1944). The case was then retried in the state court. On the new trial the prosecution did not introduce the written unsigned confession of Ashcraft. But it did introduce oral evidence showing in detail just what took place during that long examination of Ashcraft, including a statement purported to have been made by him that he knew who killed Mrs. Ashcraft. The court points out that after he had purported to help the police solve the murder of his wife for 10 days, and then stoutly maintained that he knew nothing about it for 28 hours under questioning, his admission then that he knew who killed her, carried the strongest implication of a guilty knowledge and the court said it deprived him of due process of law to admit this evidence, so obtained, against him,—even without introducing the written unsigned confession. The conviction was again reversed. Ashcraft v. Tennessee, 327 U. S. 274, 66 Sup. Ct. 544, 90 L. Ed. 677 (1946).

935. Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914); Cofer v. State, 152 Miss. 761, 118 So. 613 (1928).

936. United States v. Welsh, 247 Fed. 239 (S. D. N. Y. 1917).

937. Ambrester v. State, 172 Tenn. 144, 110 S. W. 2d 332 (1937); State v. Dittmar, 132 Wash. 501, 232 Pac. 321 (1925). Contraband, though seized illegally and suppressed as evidence, will not be returned. Trupiano v. United States, 334 U. S. 699, 68 Sup. Ct. 1229, 92 L. Ed. 1198 (1948), 2 VAND. L. REV. 116. "If petitioner was not in the lawful possession of this whiskey, this court should refrain from making him a criminal by ordering it restored to his possession." McCannless v. Evans, 177 Tenn. 86, 93, 146 S. W. 2d 354, 357 (1941). Weapons unlawfully carried by arrestees are forfeited to the state, county or municipality. § 11018. They must not be returned to the arrestee. § 11019.

938. See Suggs v. State, 129 Tenn. 498, 167 S. W. 122 (1914).

939. Russell v. State, 134 Tenn. 640, 185 S. W. 693 (1915).

940. The sureties on the bond are authorized to rearrest the former prisoner and surrender him in discharge of their liability on the bond; but if the arrest is by them they must deliver him to the officer to obtain their discharge. §§ 11683-7.

941. Russell was arrested under a magistrate's warrant and bound over to the criminal court, but released on bail. After indictment against him he was rearrested on a capias issued by the clerk without order of the court. He escaped from the apprehending officers. The sureties on his bond were held to be still liable since the clerk has no authority, without court order, to issue a capias for one who is at liberty on bail. Russell v. State, 134 Tenn. 640, 185 S. W. 693 (1915).



*Departure is not escape.* It is not an "escape," in the sense of a common law crime, for one to depart from custody without permission if he was being detained without authority of law.<sup>942</sup> And it would not constitute "breach of prison" for him to use force in order to release himself from such custody.<sup>943</sup> He would be privileged to use reasonable force for this purpose but would be liable if he resorted to unreasonably excessive force.<sup>944</sup> It may be added that an officer who voluntarily let such a prisoner go would not be guilty of the crime of "permitting escape,"<sup>945</sup> and a third person who forcibly released him would not be guilty of a criminal "rescue."<sup>946</sup>

*Removal from office.* Obviously excessive and unreasonable violence by an officer in making an arrest is ground for removal from office,<sup>947</sup> as is also his wilful refusal to give the arrestee a reasonable opportunity to arrange for bail.<sup>948</sup> In fact, wilful and persistent violation of law by making unauthorized arrests could become ground for removal in itself.<sup>949</sup> To oust a reputable officer from his office, however, his official derelictions must amount to wilful misconduct. A mere mistake in judgment will not suffice.<sup>950</sup>

#### IX. RESISTING ARREST

"Resistance" is a word of narrower import than "avoidance." One who knows of the approach of an officer coming to arrest him, for example, might be able to avoid being taken into custody by flight or by concealment; but neither type of *avoidance* would constitute *resistance*.<sup>951</sup> To bring conduct

942. "But when the imprisonment is unlawful, and is itself a crime, the reason which makes flight from prison an offense does not exist. In such a case the right to liberty is absolute, and he who regains it is not guilty of the technical offense of escape." *People v. Ah Teung*, 92 Cal. 421, 425, 28 Pac. 577, 578 (1891).

943. *State v. Leach*, 7 Conn. 452 (1829).

944. See *infra*, Section IX, B, "Resisting Unlawful Arrest."

945. *Housh v. People*, 75 Ill. 487 (1874).

946. *People v. Ah Teung*, 92 Cal. 421, 28 Pac. 577 (1891).

947. A policeman who unnecessarily threw his prisoner down, struck him, handcuffed him, and took him to the station in cold weather without permitting him to get his hat and overcoat was removed for "conduct unbecoming an officer." *People ex rel. Gunson v. Roosevelt*, 38 App. Div. 635, 57 N. Y. Supp. 11 (1st Dep't 1899). A sheriff was removed from office for drawing a revolver on an unarmed arrestee who was not resisting but was obviously cooperating with the officer. *Territory v. Sanches*, 14 N. M. 493, 94 Pac. 954 (1908); cf. *State ex rel. Boynton v. Jackson*, 139 Kan. 744, 33 P. 2d 118 (1934); Note, 100 A. L. R. 1401 (1936).

948. *Archbold v. Huntington*, 34 Idaho 558, 201 Pac. 1041 (1921).

949. *Jones v. State*, 109 S. W. 2d 244 (Tex. Civ. App. 1937). Speaking of the unauthorized arrests the court said: "arresting these various individuals and incarcerating them in jail; giving instructions to his subordinates to keep them in jail until they got ready to plead guilty; and leaving orders to put any one in jail who tried to get them out, disclose a deliberate, willful, and unlawful course of conduct on the part of respondent in the discharge of his duties as constable." *Id.* at 249-50. A sheriff may be removed from office for wilfully and persistently *refusing* to make arrests without a warrant where the public welfare requires that such arrests be made. *State ex rel. Thompson v. Reichman*, 135 Tenn. 653, 188 S. W. 225 (1916). Wilful refusal to execute process is a misdemeanor. § 11103. A second conviction of this offense results in forfeiture of office. § 11105. Cf. §§ 11424, 11426.

950. *Vandergriff v. State ex rel. Davis*, 185 Tenn. 386, 206 S. W. 2d 395 (1947).

951. The destruction of property named in a search warrant, as the officer was enter-

within the scope of "resisting arrest" positive opposition to the arrester is required. There must be either force or the threat of force.<sup>952</sup>

#### A. Resisting Lawful Arrest

The statute expressly provides for the punishment of anyone who knowingly and wilfully resists an officer in executing or attempting to execute a warrant,<sup>953</sup> or who so resists anyone attempting to make an arrest on the oral order of a magistrate for an offense committed in the magistrate's presence.<sup>954</sup> Wilfully resisting an officer who is making or attempting a lawful arrest without a warrant is punishable as a common law offense.<sup>955</sup> Special sections of the code, it may be added, provide for the punishment of one who resorts to the use of a smoke screen or poisonous gas in the effort to hinder an arrest.<sup>956</sup>

Since any active opposition to a lawful arrest must fall outside the field

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ing the building and immediately following the call, "Officer with a search warrant," was held sufficient to constitute contempt of court. *Burtch v. Zeuch*, 200 Iowa 49, 202 N. W. 542 (1925). The court spoke of it as an "illegal resistance to the service of process within the purview of the statutory definition." It is clear from the opinion that the court regarded such conduct as "an obstruction of the due administration of justice," and hence within the scope of contempt,—and it was within the statute because the statute attempted to cover this field. The court did not intimate that such conduct would constitute the crime of "resisting execution of process." IOWA CODE § 742.1 (1946). On a closely related point the Tennessee Court held that the wilful removal of property, knowing that it had been levied upon by an officer, was not resisting an officer in the execution of process. *Farris v. State*, 82 Tenn. 295 (1884). The court added, obiter, that rescue after arrest is not resisting an officer but a separate offense. As to rescue see §§ 11045, 11046, 11049-53, 11055. As to bribery of officers see §§ 11083, 11084, 11099, 11100.

952. "To constitute obstruction of an officer in the performance of his duty, it is not necessary that there be an actual or technical assault upon the officer, but there must be acts clearly indicating an intention on the part of the accused to prevent the officer from performing his duty, as to 'obstruct' ordinarily implies opposition or resistance by direct action and forcible or threatened means." *Jones v. Commonwealth*, 141 Va. 471, 126 S. E. 74, 77 (1925).

The act of continued driving of a car to get out of the jurisdiction, after an officer with a warrant had stepped on the running board of the car, telling the driver he had a warrant for his arrest and was arresting him, was "aggressive resistance." *Weissengoff v. Davis*, 260 Fed. 16, 20 (4th Cir. 1919), *cert. denied*, 250 U. S. 674 (1919).

953. The statute reads, "... resists an officer of the state, or other authorized person. . . ." § 11044. A road overseer is not an officer in the sense of this section. *Maverty v. State*, 78 Tenn. 729 (1882). As to the indictment, see *State v. Wright*, 164 Tenn. 56, 46 S. W. 2d 59 (1932); *State v. Maynard*, 62 Tenn. 348 (1874).

954. "Any one assaulting, beating, or resisting such person so summoned, and acting in obedience to such command, with knowledge of the command, is guilty in the same manner as if he had assaulted, beaten, or resisted an officer in executing legal process, and shall be punished in the same way." § 11059.

955. See *State v. Wright*, 164 Tenn. 56, 58, 46 S. W. 2d 59, 60 (1932).

956. "It is hereby declared a misdemeanor for any person who is in flight from the scene of a crime and to avoid arrest and who is being lawfully pursued by any officer or any person authorized to make arrests, said pursuit being for the purpose of arresting the fleeing party or making a lawful search of the vehicle or means of transportation used by the fleeing party, wilfully to discharge and spread in front of the pursuing party or parties any smoke screen or poisonous gases for the purpose of blinding his pursuers and/or hindering or resisting them in the performance of their lawful pursuit of the fleeing party." § 11059.1. The penalty is provided in the following section.

of legal privilege<sup>957</sup> it follows that any application of force to the person of one making or attempting such an arrest, with knowledge of his purpose and in the effort to frustrate it, constitutes a battery.<sup>958</sup> And any immediate threat of such force constitutes an assault.<sup>959</sup> Opposition to the officer in either form would constitute the crime of resisting arrest<sup>960</sup> and the prosecution ordinarily would be for this offense,—or perhaps for all three.<sup>961</sup> Knowingly resisting a lawful arrest is sufficient for malice aforethought unless the circumstances are such that no substantial element of human risk seems to be involved. Hence death resulting from such resistance is murder<sup>962</sup> unless the case comes within the exception mentioned in which event the offense is manslaughter.<sup>963</sup>

An intentional killing in resistance to a lawful arrest and with full

957. If there is legal authorization for the arrest and it is being made in a proper manner the arrestee has no right to resist. *Floyd v. State*, 82 Ala. 16, 2 So. 683 (1887). This is true even if he is innocent of the charge for which he is being arrested. *Ibid.* As the one being lawfully arrested is wholly in the wrong if he resists he cannot invoke the principle of self-defense. *White v. State*, 70 Miss. 253, 11 So. 632 (1892).

958. An officer who knocks on a person's front door does not do so at his peril and a householder is not exonerated if he harms the officer without giving the officer an opportunity to make known his purpose. *State v. Heyward*, 197 S. C. 371, 15 S. E. 2d 669 (1941).

959. *Commonwealth v. Kirby*, 56 Mass. 577 (1849); see also *Pierce v. State*, 17 Tex. App. 232 (1884).

960. See *State v. Wright*, 164 Tenn. 56, 58, 46 S. W. 2d 59, 60 (1932).

961. A conviction of resisting an officer, and assault and battery, was held proper. *State v. Shaw*, 104 S. C. 359, 89 S. E. 322 (1916).

962. The early writers applied the label murder to any killing of a known officer resulting from resistance to a lawful arrest undertaken by him. 3 CO. INST. \*52; 1 HALE P. C. \*457. And it has frequently been stated, without qualification, that homicide resulting from resistance to lawful arrest, with knowledge of the facts, is murder. *Lewis v. State*, 40 Tenn. 127 (1859). In such cases, however, the killing usually was shown to have resulted from shooting, *Sexson v. Commonwealth*, 239 Ky. 177, 39 S. W. 2d 229 (1931); *State v. Genese*, 102 N. J. L. 134, 130 Atl. 642 (1925); or from the use of some other dangerous force, such as stabbing with a knife, *State v. Zeibart*, 40 Iowa 169 (1874); or striking with a heavy club, *Glaze v. State*, 156 Ga. 807, 120 S. E. 530 (1923). As to an unexpected killing as a result of resisting arrest under circumstances that seem to involve no substantial element of human risk, see the following footnote.

963. One who was being lawfully arrested objected to being put in a vehicle which was to transport him to jail. As he was being forced inside his foot came in contact with the head of one of his arresters with fatal consequences. In a trial for murder the judge directed the jury to inquire into the circumstances of the actual contact, and to find the defendant guilty of murder if the death resulted from a kick intentionally directed at the deceased, or at anyone else; but to find the defendant guilty of manslaughter only if the fatal blow was an unintentional contact while the defendant was merely struggling in the effort to keep out of the vehicle. The verdict was "guilty of manslaughter." *Queen v. Porter*, 12 Cox C. C. 444 (1873). In another case an officer, who stepped on the running board of a car to make an arrest, was killed when the car struck a bridge which the driver was seeking to cross to reach a neighboring jurisdiction. It is quite possible that the act may have been sufficiently dangerous to support a conviction of murder; but the jury was not permitted to inquire into this aspect of the matter. The trial judge had in mind the old statement that one who caused death by knowingly resisting a lawful arrest was guilty of murder, and he submitted the case to the jury on this basis. This was held to be such prejudicial error as to call for a new trial. The defendant was entitled to have the jury determine whether his wrongful conduct in resisting a lawful arrest did, or did not, involve a substantial element of human risk. *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450 (1919). The Louisiana Code expressly provides that it is manslaughter to kill by resisting arrest by means and in a manner not inherently dangerous. LA. CODE CR. LAW AND PROC., art. 740-31 (Dart, 1943).

knowledge of the facts cannot be reduced to the grade of manslaughter under the "rule of provocation" <sup>964</sup> because "the law does not allow that a lawful arrest is a provocation to passion and heat of blood. And, if the officer had the right, under the circumstances proven, to make the arrest, and was engaged, using no more force than was reasonably necessary, in accomplishing it, then the killing of him by the defendant would be murder; and the fact that the killing was in the heat of blood caused by a lawful arrest, would not reduce the offence to the grade of manslaughter." <sup>965</sup>

Resistance to a lawful arrest will be excused if the arrestee does not know or have reason to know what the facts are, provided his resistance would have been lawful had the facts been as they reasonably appeared to him at the moment. Thus, if an officer, acting with full authority, is killed by the arrestee who did not know and was not informed of the official character of the officer, and his purpose, the slayer may be excused under the plea of self-defense if he reasonably thought himself in danger of immediate death or great bodily injury, even if his defense was so prompt that the officer was prevented from giving notice at that time. <sup>966</sup>

One who is harmed or inconvenienced as a result of his own resistance to an authorized arrest being made or attempted in a lawful manner has no action for damages based upon alleged assault, battery, false arrest or false imprisonment. <sup>967</sup>

#### B. Resisting Unlawful Arrest <sup>968</sup>

An unlawful arrest is a trespass <sup>969</sup> and hence, according to the common law, it may be resisted by any nondeadly force which is necessary, or reasonably seems to be necessary, to retain or regain the liberty of the arrestee. <sup>970</sup>

964. A lawful arrest "can, of itself, be no provocation in law, since every person is bound to submit to the regular course of justice." *State v. Spaulding*, 34 Minn. 361, 363, 25 N. W. 793, 794 (1885). An officer properly attempting to make a lawful arrest is not in a legal sense "provoking a difficulty" so as to be deprived of the privilege of self-defense. *Hickman v. Durham*, 213 S. W. 2d 569 (Tex. Cr. 1948).

965. *Galvin v. State*, 46 Tenn. 283, 292-93 (1869).

966. *Starr v. United States*, 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841 (1894); *Johnson v. State*, 19 Ala. App. 141, 95 So. 583 (1923); *Mullis v. State*, 196 Ga. 569, 27 S. E. 2d 91 (1943).

967. *Calloway v. Fogel*, 213 S. W. 2d 405 (Mo. 1948). And if he was killed while so resisting lawful arrest there can be no recovery under a life insurance policy which exempts the company from liability if the insured shall die as a result of acts committed by him "in violation of law." *Life & Casualty Ins. Co. v. Hargraves*, 169 Tenn. 388, 88 S. W. 2d 451 (1935).

968. Note, 23 MICH. L. REV. 62 (1924).

969. *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200 (1893); *Poteete v. State*, 68 Tenn. 261 (1878); *Roberson v. State*, 43 Fla. 156, 29 So. 535 (1901); *Yates v. State*, 73 Okla. Cr. 51, 117 P. 2d 811 (1941). "An unlawful arrest, made *bona fide* under color of legal authority, is a trespass. . . ." *Galvin v. State*, 46 Tenn. 283, 292 (1869).

970. "If the attempted arrest be unlawful, the party sought to be arrested, may use such reasonable force, proportioned to the injury attempted upon him, as is necessary to effect his escape, but no more; and he can not do this by using or offering to use a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest." *Galvin v. State*, 46 Tenn. 283, 295 (1869).

This is true whether the unlawfulness is due to lack of authority to make the arrest<sup>971</sup> or to illegality in the manner in which the arrest is made or attempted.<sup>972</sup> An occasional statute has made an important change in this regard by distinguishing between the two types of unlawful arrest. The Uniform Arrest Act (not enacted in Tennessee)<sup>973</sup> makes it the duty of the citizen to submit to an arrest by a known officer even if the officer is acting beyond his legal authority.<sup>974</sup> Were the law of arrest so simple and well understood that both officer and citizen could always be expected to know exactly when authority to arrest is present or absent, the rule of the common law on this point might be satisfactory. In fact, however, it is not uncommon for an officer to undertake an arrest in the firm belief that he has authority to do so while the arrestee is equally certain that such an arrest is quite unauthorized. If nothing is involved other than temporary detention of the arrestee while he is being carried before a magistrate it would seem wise to require him to submit to the arrest at the time and seek redress if entitled thereto. This would permit the question of the authority of the officer to be determined in the court room rather than to have this difference of opinion settled by force on the street.<sup>975</sup>

If the unlawful arrest is attempted by a known officer, under circumstances which obviously threaten no more than a very temporary deprivation of liberty, the use of deadly force in resistance is not privileged even under existing law;<sup>976</sup> but if the unlawful manner of the arrest reasonably leads

971. *State v. Belk*, 76 N. C. 10 (1877).

972. If an officer makes use of unprivileged force in effecting an arrest the person subjected to this unreasonable force may defend himself whether the officer has a warrant or not. *Black v. State*, 96 Tex. Cr. 56, 255 S. W. 731 (1923).

973. Not enacted in Tennessee at the time this is written—March 1, 1949.

974. Uniform Arrest Act, § 5. Rhode Island made an unfortunate change in the wording of this section because it speaks of "an illegal arrest by a peace officer" and hence does not distinguish an unauthorized arrest from one being made in an improper manner. R. I. Pub. Laws 1941-42, c. 982, § 1, cl. 4.

975. An unauthorized arrest was a fearful experience in the early days when release on bail was seldom granted and persons incarcerated were "frequently huddled together in dark, filthy rooms, in close proximity to depravity and disease" including a malignant form of typhus known as "gaol fever." Warner, *Investigating the Law of Arrest*, 31 J. OF CRIM. L. AND CRIMINOLOGY 111, 113 (1940). It was quite proper to permit the citizen to resist an unauthorized arrest with whatever nondeadly force was required for this purpose when such grave consequences were involved. Today it would be wiser to adopt some such provision as is found in the Uniform Arrest Act (§ 5): "If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for arrest." The text of the Uniform Arrest Act is quoted in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-47 (1942).

976. *Galvin v. State*, 46 Tenn. 283 (1869); *Palmquist v. United States*, 149 F. 2d 352 (5th Cir. 1945), cert. denied, 326 U. S. 727 (1945); *Reichman v. Harris*, 252 Fed. 371 (6th Cir. 1918); *Green v. State*, 238 Ala. 143, 189 So. 763 (1939); *Smith v. People*, 315 Ill. App. 671, 43 N. E. 2d 420 (1942); *Mims v. Commonwealth*, 236 Ky. 186, 32 S. W. 2d 986 (1930); *State v. Long*, 88 W. Va. 669, 108 S. E. 279 (1921); 21 MICH. L. REV. 702 (1923). "When the arrest is made by a known officer and nothing is to be apprehended beyond a temporary detention in jail, resistance obviously cannot be carried to the extent of taking life" even if the arrest is unauthorized. *State v. Cates*, 97 Mont. 173, 202, 33 P. 2d 578, 587 (1934). As to the confusion in the South Carolina cases on this point, see Note, *The Right to Kill in Resisting an Illegal Arrest*, 1 S. C. L. Q. 298 (1949).

the arrestee to believe he is the victim of a murderous assault,<sup>977</sup> or of kidnapers,<sup>978</sup> homicide committed by him will be excusable self-defense if he used no more force than reasonably appeared to be necessary under the circumstances.

The mere fact that an officer exceeds his authority in making or attempting an arrest does not deprive him of the right to defend himself, by deadly force if necessary, if the arrestee resists with such excessive force as to endanger the officer's life.<sup>979</sup> Conversely, if an officer in making an authorized arrest begins to shoot at the arrestee under circumstances in which deadly force is entirely uncalled for and unlawful, the arrestee is privileged to defend himself even to the extent of taking the officer's life if this extreme measure is necessary to save his own.<sup>980</sup>

An unlawful arrest, or attempted arrest, may be under circumstances sufficient to constitute adequate provocation to reduce even an intentional and obviously unnecessary killing to manslaughter, if it is committed in a sudden heat of passion engendered thereby;<sup>981</sup> but the mere fact that the apprehension is beyond the actual authority of the law will not necessarily produce this result.<sup>982</sup> As said by the Tennessee court: "The law recognizes the sacredness of the right of personal liberty, and jealously guards it from violation. It recognizes the fact, that an invasion of that right may be, and often is, the most aggravated provocation. But the only effect to be given to the fact that the killing was in resisting an illegal arrest, rests upon the proven or presumed provocation; and the law does not arbitrarily reduce to the grade of manslaughter every homicide which may be committed in the act of such resistance, without reference to the presence or absence of actual malice and deliberation."<sup>983</sup> The mere fact, added the court, that the officer "has exceeded his authority, does not necessarily reduce the killing to manslaughter."<sup>984</sup> It may be added that heat of passion cannot

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977. *Sanders v. State*, 181 Ala. 35, 61 So. 336 (1913); *Robinson v. State*, 93 Ga. 77, 18 S. E. 1018 (1893); *State v. Phillips*, 118 Iowa 660, 92 N. W. 876 (1902); *Howard v. Commonwealth*, 246 Ky. 738, 56 S. W. 2d 362 (1933); *State v. Clark*, 64 W. Va. 625, 63 S. E. 402 (1908). And see *Mullis v. State*, 196 Ga. 569, 27 S. E. 2d 91 (1943).

978. *Alford v. State*, 8 Tex. App. 545 (1880).

979. *Wilkinson v. State*, 143 Miss. 324, 108 So. 711 (1926).

980. *Plummer v. State*, 135 Ind. 308, 34 N. E. 968 (1893); *Vann v. State*, 45 Tex. Cr. 434, 77 S. W. 813 (1903).

981. *Giddens v. State*, 154 Ga. 54, 113 S. E. 386 (1922); *People v. White*, 333 Ill. 512, 165 N. E. 168 (1929). "... it is not so reduced unless the person sought to be arrested actually acted under the influence of hot blood induced by the provocation." *Hurd v. State*, 119 Tenn. 583, 595, 108 S. W. 1064, 1067 (1907).

982. Some of the older cases seem to have assumed that homicide committed while resisting an unlawful arrest could not be more than manslaughter. *E.g.*, *Tackett v. State*, 11 Tenn. 392 (1832). See, in general, Note, *Illegal Arrest as Sufficient Provocation to Mitigate a Homicide*, 37 Ky. L. J. 316 (1949).

983. *Galvin v. State*, 46 Tenn. 283, 291-92 (1869).

984. *Id.* at 292. One court has suggested that an arrest without due authority may be great provocation to an innocent man but not to a felon. *Brooks v. Commonwealth*, 61 Pa. 352 (1869).

be inflamed by an unknown "provocation." Hence one who has intentionally killed while resisting an arrest he thought was lawful could in no event be entitled to have the grade of the homicide reduced to manslaughter because he subsequently learned that the arrest was unlawful.<sup>985</sup>

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985. *Miller v. State*, 31 Tex. Cr. 609, 21 S. W. 925 (1893). "I understand the law of this state to be that if an officer arrests a party illegally, and that party does not know whether the arrest is legal or not, but draws a pistol and kills the officer, that the question of legality or illegality of the arrest would not be in the case at all. In other words, appellant's guilt or innocence depends upon his knowledge or intent." *Earles v. State*, 52 Tex. Cr. 140, 148, 106 S. W. 138, 141-42 (1907).